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Supreme Court of the United States

OCTOBER TERM, 1995

PACIFICA FOUNDATION; NATIONAL FEDERATION OF COMMUNITY BROADCASTERS; PUBLIC RADIO INTERNATIONAL; NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS; INTERCOLLEGIATE BROADCAST SYSTEM; PEN AMERICAN CENTER; ALLEN GINSBERG,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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195

QUESTIONS PRESENTED

1. Whether section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954, and the Federal Communications Commission's order implementing section 16(a), which impose an eighteen-hour ban, from 6 a.m. to midnight, on the broadcast of purportedly indecent speech, violate the First Amendment to the Constitution of the United States by failing to provide a meaningful safe harbor during which constitutionally protected speech of serious merit may be broadcast, particularly in light of the government's broad and vague definition of indecency?

2. Whether Congress and the Federal Communications Commission have misconstrued *FCC* v. *Pacifica*, 438 U.S. 726 (1978), as an open invitation to censor broadcasts of purportedly indecent speech regardless of their merit, thereby infringing the First Amendment rights of the broadcast audience?

3. Whether the First Amendment permits Congress and the Federal Communications Commission to censor all speech falling within the Commission's broad and vague definition of indecency on the unsupported theory that such speech harms minors up to the age of 18 and that parents cannot be trusted to supervise their children?

LIST OF PARTIES

The following persons and entities are now before the Court and were parties to proceeding No. 93-1100 in the United States Court of Appeals for the District of Columbia Circuit:

Petitioners: Pacifica Foundation; National Federation of Community Broadcasters; Public Radio International (formerly American Public Radio); National Association of College Broadcasters; Intercollegiate Broadcast System; PEN American Center; and Allen Ginsberg.

Respondents: Federal Communications Commission and United States of America.

The following persons and entities were parties to proceeding No. 93-1092 in the United States Court of Appeals for the District of Columbia Circuit, the case with which No. 93-1100 was consolidated on appeal:[1/]

Petitioners: Action for Children's Television; American Civil Liberties Union; The Association of Independent Television Stations, Inc.; Capital City/American Broadcasting Co., Inc.; CBS, Inc.; Fox Television Stations, Inc.; Greater Media, Inc.; Infinity Broadcasting Corporation; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Public Radio; People for the American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; Reporters Committee for Freedom of the Press; and Society of Professional Journalists.

Respondents: Federal Communications Commission and United States of America.

[1/] Although the two cases, *Pacifica Foundation* v. *FCC*, No. 93-1100 and *Action for Children's Television* v. *FCC*, No. 93-1092, were consolidated on appeal, petitioners in this instant action retained their full party status, filed separate briefs, and presented oral argument.

RULE 29.1 STATEMENT

Petitioners Pacifica Foundation, National Federation of Community Broadcasters, Public Radio International, National Association of College Broadcasters, Intercollegiate Broadcast System, PEN American Center, and Allen Ginsberg have no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Rules of the Supreme Court.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

RULE 29.1 STATEMENT iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. Background 4

B. *ACT I* 5

C. *ACT II* 6

D. *ACT III* 7

REASONS FOR GRANTING THE WRIT 9

I. THE BAN ON BROADCAST INDECENCY PRESENTS A QUESTION OF NATIONAL IMPORTANCE 11

II. THE COURT'S PRECEDENTS DO NOT SUPPORT A MIDNIGHT TO 6 A.M. BAN ON INDECENT BROADCASTS 17

III. THE 6 A.M. TO MIDNIGHT BAN IS UNSUPPORTED BY ANY EVIDENCE OF HARM TO MINORS AND IS NOT NARROWLY TAILORED TO SERVE THE GOVERNMENT'S ASSERTED INTERESTS .. 20

A. There Is No Evidence That Broadcast Indecency Harms Children 21

B. The Safe Harbor Is Insufficiently Tailored To Serve The Government's Interest In Facilitating Parental Supervision Of Children 26

CONCLUSION 30

APPENDIX

En Banc Opinion, Nos. 93-1092, 93-1100, United States Court of Appeals for the District of Columbia Circuit (June 30, 1995) 1a

Panel Opinion, Nos. 93-1092, 93-1100, United States Court of Appeals for the District of Columbia Circuit (November 23, 1993) 69a

Report and Order, Federal Communications Commission, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464* (January 22, 1993) 102a

Notice of Proposed Rule Making, Federal Communications Commission, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464* (October 5, 1992) 135a

Order Granting Respondents' Suggestion For Rehearing In Banc, Nos. 93-1092, 93-1100, United States Court of Appeals for the District of Columbia Circuit (February 16, 1994) ... 149a

Judgment, Nos. 93-1092, 93-1100, United States Court of Appeals for the District of Columbia Circuit (June 30, 1995) 151a

TABLE OF AUTHORITIES

CASES Page

Action for Children's Television v. *FCC*,
852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*") . . . *passim*

Action for Children's Television v. *FCC*,
932 F.2d 1504 (D.C. Cir. 1991) ("*ACT II*"),
cert. denied, ___ U.S. ___,
112 S. Ct. 1281-82 (1992) . . . . . *passim*

Alliance for Community Media v. *FCC*,
56 F.3d 105 (D.C. Cir. 1995) 12, 14, 28

Bolger v. *Youngs Drug Products Corp.*,
463 U.S. 60 (1983) 16, 24, 26, 27

Butler v. *Michigan*, 352 U.S. 380 (1957) 16

Carey v. *Population Services International*,
431 U.S. 678 (1977) 24, 25

Edenfield v. *Fane*, ___ U.S. ___,
113 S. Ct. 1792 (1993) 11, 20

Erznoznik v. *City of Jacksonville*,
422 U.S. 205 (1975) 24

FCC v. *League of Women Voters of California*,
468 U.S. 364 (1984) 20

FCC v. *Pacifica*, 438 U.S. 726 (1978) . . . . . *passim*

Ginsberg v. *New York*, 390 U.S. 629 (1968) 21, 22

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 27, 28

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 27

Prince v. *Massachusetts*, 321 U.S. 158 (1944) 28

R.A.V. v. *City of Saint Paul*, ___ U.S. ___,
112 S. Ct. 2538 (1992) 9, 19

Rosenberger v. *Rector and Visitors of the*
University of Virginia, ___ U.S. ___,
115 S. Ct. 2510 (1995) 9

Rubin v. *Coors Brewing Co.*, ___ U.S. ___,
115 S. Ct. 1585 (1995) 11, 20

Runyon v. *McCrary*, 427 U.S. 160 (1976) 27

Sable Communications of California, Inc. v. *FCC*,
492 U.S. 115 (1989) . . . . . *passim*

Schneider v. *New Jersey*, 308 U.S. 147 (1939) 17

South Fork Broadcasting Corp. v. *FCC*,
59 F.3d 1249 (D.C. Cir. 1995) 14

Tinker v. *Des Moines Ind. Community Sch. District*,
393 U.S. 503 (1969) 25

Turner Broadcasting System, Inc. v. *FCC*,
___ U.S.___, 114 S. Ct. 2445 (1994) . . . . . *passim*

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 28

CONSTITUTION

Constitution of the United States,
First Amendment ..... *passim*

FEDERAL STATUTES, LAWS, AND REGULATIONS

18 U.S.C. § 1464 ..... 2, 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2342(1) 3

47 U.S.C. § 402(a) 3

Pub. L. No. 100-459, 102 Stat. 2186 (1988) 6

Public Telecommunications Act of 1992,
Pub. L. No. 102-356, 106 Stat. 949 ..... 2, 3, 7

Radio Act of 1927, Pub. L. No. 69-632,
44 Stat. 1162 (1927) 4

47 C.F.R. § 73.3999 ..... 1, 2, 3, 8

ADMINISTRATIVE ORDERS, NOTICES, AND LETTERS

In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464,
4 F.C.C.R. 8358 (1989) 7

In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464,
5 F.C.C.R. 5297 (1990) 7, 29

In re Infinity Broadcasting Corp. of Pa.,
3 F.C.C.R. 930 (1987) 5, 12

KLUC-FM, Notice of Apparent Liability,
6 F.C.C.R. 3695 (1990) 13

KSD-FM, Notice of Apparent Liability,
6 F.C.C.R. 3689 (1990) 13

Kansas City Television Ltd., Order, FCC 88-274
(released Aug. 5, 1988), *vacated*,
4 F.C.C.R. 6706 (1989) 13

Letter to Hon. John E. Bourne, Jr., from Chief,
Mass Media Bureau (Oct. 26, 1989) 13

Letter to Mr. and Mrs. Ronald Orle from Chief,
Mass Media Bureau (Apr. 7, 1988) 13

Letter to Thomas Byrne from Chief, Mass Media Bureau
(Apr. 7, 1988) 13

*New Indecency Enforcement Standards to be Applied to
All Broadcast and Amateur Radio Licenses*,
2 F.C.C.R. 2726 (1987) 5

Pacifica Foundation, Inc., 2 F.C.C.R. 2698
*reconsideration and clarification granted in
part, denied in part sub. nom. Infinity
Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930
(1987), *vacated in part and remanded sub. nom.
Action for Children's Television* v. *FCC*,
852 F.2d 1332 (D.C. Cir. 1988) 13

WLLZ, Notice of Apparent Liability,
6 F.C.C.R. 3698 (1989) 13

LEGISLATIVE HISTORY

138 Cong. Rec. S7308-22 (daily ed. June 2, 1993) . . 24, 25

OTHER AUTHORITIES

Comments of Action for Children's Television, et al., MM Docket No. 89-494 (filed with the Federal Communications Commission Feb. 19, 1990) 27

Comments of Pacifica Foundation, et al., GC Docket No. 92-223 (filed with the Federal Communications Commission Nov. 6, 1992) 14, 29, 30

Comments of Pacifica Foundation, et al., MM Docket No. 89-494 (filed with the Federal Communications Commission Feb. 20, 1990) 14

FCC Investigating; Group W Says Indecency Finding Against KYW-TV Philadelphia Would be Censorship, Communications Daily, Apr. 26, 1993 13

Nielsen Television Index (Second Quarter 1992) 16

RADAR 45 (Spring 1992) 16

Harry P. Warner, *Radio & Television Law* (1948) 4

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Pacifica Foundation, National Federation of Community Broadcasters, Public Radio International, National Association of College Broadcasters, Intercollegiate Broadcast System, PEN American Center, and Allen Ginsberg respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (1a)[2/] is reported at 58 F.3d 654 (D.C. Cir. 1995) (en banc). The panel opinion of the court of appeals (69a) is reported at 11 F.3d 170 (D.C. Cir. 1993). The report and order of the Federal Communications Commission amending 47 C.F.R. § 73.3999 (102a) is reported at 8 F.C.C.R. 704 (1993). The Federal Communications Commission's notice of proposed rule making (135a) is reported at 7 F.C.C.R. 6464 (1992).

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1995 (151a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United

[2/] References to "(__a)" are to the pages in the appendix to this petition.

States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Section 1464 of Title 18 of the United States Code provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954, provides:

> The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming --
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcast station not described in paragraph (1).

Section 73.3999 of Title 47 of the Code of Federal Regulations provides:

> (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.
> (b) No licensee of a public broadcast station, as defined in 47 U.S.C. § 397(6), that goes off the

air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

(c) No licensee of a radio or television broadcast station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.

STATEMENT OF THE CASE

Petitioners, a coalition of non-commercial educational radio stations and distributors, broadcasting and literary associations, and a contemporary poet, brought this action in the United States Court of Appeals for the District of Columbia Circuit to review a January 22, 1993 Order of the Federal Communications Commission ("FCC" or "Commission") (102a), which imposes an eighteen-hour ban, from 6 a.m. to midnight, on the broadcast of constitutionally protected speech that the Commission deems to be indecent. The prohibition was mandated by section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 ("Telecommunications Act"). The court of appeals had jurisdiction over this action under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). A unanimous panel of the court of appeals vacated the FCC's 1993 Order and held section 16(a) of the Telecommunications Act unconstitutional because the government had failed to tailor sufficiently its 6 a.m. to midnight ban on constitutionally protected speech so as to advance the asserted governmental interests without infringing First Amendment rights. (69a.) Upon rehearing en banc, however, the court of appeals in a 7 to 4 decision upheld section 16(a), ruling that a 6 a.m. to midnight ban on indecent broadcasts was constitutional. (1a.) The court did so despite two prior decisions of the same court, *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (Ginsburg,

R.B., Robinson, and Sentelle, JJ.) ("*ACT I*"), which struck down a virtually identical 6 a.m. to midnight ban, and *Action for Children's Television* v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (Mikva, Edwards, Thomas, JJ.) ("*ACT II*"), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1281-82 (1992), which invalidated a 24-hour ban on indecent broadcasts.

A. Background

Since the passage of the Radio Act of 1927, which first prohibited the broadcast of "obscene, indecent, or profane language," Pub. L. No. 69-632, § 29, 44 Stat. 1162, 1172-73, Congress and the FCC have periodically sought to ban or restrict the broadcast of programs of unquestionable merit because they purportedly contain material that may be considered offensive or sexually suggestive.[3/] For example, in the 1930s, the FCC investigated several radio stations for broadcasting a presentation of Eugene O'Neill's Pulitzer Prize-winning play, *Beyond the Horizon*, and during the Spanish Civil War, it investigated both CBS and the NBC Blue Network for broadcasting supposedly suggestive Spanish songs. Harry P. Warner, *Radio & Television Law* § 34a at 339, 337 (1948).

More recently, in the 1970s, the FCC turned its attention to the repeated use of what have become known as the "seven dirty words." In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), a sharply-divided Court found that the FCC was within its authority to find "indecent" under 18 U.S.C. § 1464 the "repetitive" and "deliberate" utterance of words denoting "excretory or sexual activities or organs . . . in an afternoon

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3/ Federal law, 18 U.S.C. § 1464, currently provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

broadcast when children are in the audience . . . ." *Id.* at 739. However, in so doing, the Court repeatedly "emphasize[d] the narrowness of [its] holding," *id.* at 750, and made clear that "questions concerning possible action in other contexts were expressly reserved for the future." *Id.* at 734.

Following the Court's ruling in *Pacifica*, the FCC, for the next decade, limited enforcement of its indecency regulation to material involving the repetitive and deliberate use for shock value of the so-called seven dirty words -- the *Pacifica* situation. *See In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 ¶ 4 (1987) ("*Reconsideration Order*"). In addition, the FCC took no action against broadcasters who broadcast so-called "indecent" speech after 10:00 p.m. *Id.* But then, in 1987, the FCC suddenly announced that it was substantially expanding its regulation of broadcast indecency, and concurrently issued rulings that three broadcasters, two of which were public radio stations, had violated the new policy. *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licenses*, 2 F.C.C.R. 2726 (1987). Instead of confining itself to the narrow strictures of *Pacifica*, the FCC determined that it would consider "indecent" any speech encompassed by its generic definition of indecency -- any "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* A number of petitioners sought reconsideration of the FCC's notice. On reconsideration, the FCC reaffirmed its broader enforcement policy, as well as narrowed the safe harbor for the broadcast of so-called "indecent" speech to the hours between midnight and 6 a.m. *Reconsideration Order*, 3 F.C.C.R. 930 ¶ 5, ¶ 27, n.47.

B. *ACT I*

A wide range of petitioners challenged the FCC's 1987 *Reconsideration Order* as violating the First Amendment. In

ACT I, 852 F.2d 1332 (D.C. Cir. 1988), the court of appeals struck down the FCC's 6 a.m. to midnight prohibition on the broadcast of indecent speech, the same prohibition at issue here, as unconstitutional. In particular, the court emphasized that given the "less than precise definition of indecency," *id.*, the FCC was obligated to implement a more "reasonable safe harbor" period to "allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences . . . ." *Id.* at 1343, n.18. The court further concluded that in light of the FCC's "avowed objective . . . not to establish itself as censor but to *assist parents* in controlling the material young children will hear," *id.* at 1334, the FCC was required to adopt a "securely-grounded channeling rule" that would "most effectively promote parental -- as distinguished from government -- control." *Id.* at 1344. The court thus remanded the matter to the FCC for "a full and fair hearing . . . of the times at which indecent material may be broadcast." *Id.*

C. *ACT II*

Before the FCC was able to carry out the court's mandate, Congress passed an appropriations rider directing the FCC to promulgate regulations imposing a 24-hour ban on broadcast indecency. Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988). In light of the Court's opinion in *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989), striking down a blanket ban on indecent telephone services on First Amendment grounds, however, the court of appeals directed the FCC to conduct "a full and fair hearing on the issue of the propriety of indecent broadcasting" prior to promulgating any such regulations. Order, *Action for Children's Television* v. *FCC*, No. 88-1916 (D.C. Cir. Sept. 13, 1989). In response to the court of appeals' order, the FCC issued a notice of inquiry and conducted rule making proceedings. Instead of endeavoring to provide the "full and fair hearing" the court of appeals ordered, the FCC declared that

the goal of the notice of inquiry was "to compile a record in support of Congress' imposition of a 24-hour ban on the broadcast of indecent material." *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358 ¶ 1 (1989). Notwithstanding that the uncontroverted evidence demonstrated that for large periods during the day virtually all children in the broadcast audience were under the supervision of parents and adults, the FCC issued a report concluding that a complete ban on the broadcast of indecent speech was justified. *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297 (1990).

In *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), the court of appeals struck down this blanket ban on the broadcast of indecent speech. Relying on the principles set forth in *ACT I*, which the Court reaffirmed in *Sable*, the court of appeals again found that the First Amendment required the FCC to designate "some reasonable period" as a safe harbor for the broadcasting of speech that might be considered indecent. *Id.* at 1509. Indeed, the court held that not even "Congress itself" could totally ban indecent material. *Id.* The court thus once again remanded the case to the FCC with yet another directive for "a full and fair hearing" to determine at what times indecent speech could be broadcast. *Id.* at 1510.

D. *ACT III*

Before the FCC held hearings pursuant to the court's mandate in *ACT II*, Congress once again intervened, enacting the Telecommunications Act. Section 16(a) of the Act required the FCC to promulgate a new rule prohibiting the broadcast of indecent speech from 6 a.m. to midnight.[4] On October 5, 1992,

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[4] The Act allowed public broadcast stations that go off the air at or before midnight an additional two hours, between 10 p.m. and midnight, during which they could broadcast indecent material.

the FCC issued a notice of proposed rule making, seeking comments on revisions to 47 C.F.R. § 73.3999 to implement the new 6 a.m. to midnight ban. (135a.) The FCC stated in its notice that because Congress had already "balanced the competing interests affected by the regulation of broadcast indecency," the rule making proceeding would be "quite narrow" in focus and "confined to the matter of updating the Commission's record." (141a.)

On January 22, 1993, the Commission released an order adopting regulations enforcing the indecency prohibitions prescribed by section 16(a) of the Telecommunications Act. (102a.) In attempting to justify the eighteen-hour ban imposed on the broadcast of indecent speech, the FCC contended that its interest in regulating broadcast indecency was not "restricted to ensuring that parents have an opportunity to supervise their children's listening and viewing," but also encompassed "the government's independent interest in ensuring the well being of minors" regardless of parental supervision. (107a-108a.) The FCC also asserted an interest in protecting "the right of all members of the public to be free of indecent material in the privacy of their homes." (110a.)

In support of its regulation, the FCC relied almost exclusively on the record compiled in its 1990 rule making proceeding in support of a 24-hour prohibition, which found that "significant" numbers of persons under 18 are in the broadcast audience at all hours (113a), and on its contention that many of those persons are not "effectively supervise[d]" with respect to their exposure to television and radio "during all times of the day." (127a.) Based on this "evidence," the FCC concluded that the 6 a.m. to midnight ban "reasonably balances the compelling interest of protecting children from exposure to indecent broadcast material at all times against the interests of broadcasters and adults." (120a-121a.)

A broad range of petitioners again challenged the Commission's ban and on November 23, 1993, in *ACT III*, a unanimous panel of the court of appeals struck down section

16(a) of the Telecommunications Act and vacated the FCC's 1993 Order implementing this section. (69a.) The panel concluded that the government's 6 a.m. to midnight ban was not sufficiently tailored and thus abridged First Amendment rights. According to the court, the government wholly failed to take into account the First Amendment rights of adults and older minors in determining when indecent speech could be broadcast or to provide a reasonable period during which "viewers could exercise a meaningful choice to view the material while still awake." (93a.)

The court of appeals granted the government's suggestion for rehearing en banc, and on June 30, 1995, the court of appeals en banc reversed the panel's decision, finding that the 6 a.m. to midnight ban imposed by section 16(a) was constitutional. (1a.)

REASONS FOR GRANTING THE WRIT

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting Sys., Inc.* v. *FCC*, ___ U.S. ___, ___, 114 S. Ct. 2445, 2458 (1994) ("*TBS*"). From this central tenet flows the equally axiomatic propositions that "the government may not regulate speech based on its substantive content or the message it conveys," *Rosenberger* v. *Rector and Visitors of the Univ. of Virginia*, ___ U.S. ___, ___, 115 S. Ct. 2510, 2516 (1995), and that such restrictions are "presumptively invalid." *R.A.V.* v. *City of Saint Paul*, ___ U.S. ___, ___, 112 S. Ct. 2538, 2542 (1992).

The en banc decision of the court of appeals, upholding the 6 a.m. to midnight ban on the broadcasting of indecent speech, flies in the face of these bedrock constitutional

principles.[9] In upholding the broadcast ban, with its all-encompassing and open-textured definition of indecency, the court of appeals denies to millions of Americans the ability to choose what programs to see and hear in "a medium that has become a vital part of the Nation's communication system." *TBS*, 114 S. Ct. at 2461. If this ruling is allowed to stand, millions of Americans will be precluded from receiving broadcasts of serious literary and artistic works, such as those of petitioner Allen Ginsberg, as well as discussions of significant social and political issues such as AIDS, rape, war, and adult sexuality. Instead, they will be unconstitutionally limited to watching and hearing only programming fit for children. *See Sable*, 492 U.S. at 127.

The court of appeals decision also misconstrues *FCC* v. *Pacifica Foundation, Inc.*, 438 U.S. 726 (1978), as an open invitation to the government to censor any form of broadcast indecency, regardless of its political, social, literary, or artistic merit. The Court's precedents simply do not support such a ban. In *Pacifica* itself, *see* 438 U.S. at 734-35, 742, 750, and in later decisions, *see, e.g., Sable*, 492 U.S. at 127, the Court has stressed the "emphatically narrow holding" of *Pacifica*, which was based on the repeated use of specific words in a specific broadcast in the early afternoon. Nothing in *Pacifica* exempts courts from "apply[ing] the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential

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[9] Although the court of appeals majority ultimately concluded that section 16(a) was unconstitutional insofar as it contained an exception permitting public radio and television stations that go off the air at or before midnight to broadcast indecent speech after 10 p.m., the court held that "standing alone, the midnight to 6 a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth." (25a-26a.) In so holding the court "invite[d] Congress to extend the 6 a.m. to midnight ban to all broadcasters, without exception." (31a.) (Edwards, C.J., dissenting). Accordingly, the instant petition squarely presents the Court with the constitutionality of the 6 a.m. to midnight indecency ban.

burdens on speech because of its content." *TBS*, 114 S. Ct. at 2459. Indeed, the Court has recently reaffirmed that the government may restrict "[s]exual expression which is indecent but not obscene" only "to promote a compelling interest [and] if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126.

Finally, the decision below errs in its analysis of the two interests the government asserts in support of imposing a sweeping prohibition of purportedly indecent broadcasts: a concern for the health and well-being of minors and the promotion of parental supervision over their children. (13a.) For each of these interests, the government must provide substantial evidence that the harms it seeks to avoid are genuine and that its restriction of protected expression will alleviate those harms to a substantial degree. Equally important, the government bears the burden of demonstrating that the indecency ban is carefully tailored to achieve its professed goals and burdens no more speech than is absolutely necessary. *See TBS*, 114 S. Ct. at 2470-72; *Sable*, 492 U.S. at 126. *See also Rubin* v. *Coors Brewing Co.*, ___ U.S. ___, ___, 115 S. Ct. 1585, 1592-93 (1995); *Edenfield* v. *Fane*, ___ U.S. ___, ___, 113 S. Ct. 1792, 1800 (1993). Application of these standards here exposes the constitutional infirmity of Congress' action. The lack of any evidence that purportedly indecent broadcasts harm children, the imprecise way in which the broadcast ban achieves the government's interests, and the failure to consider the First Amendment rights of adults and older children, as well as less speech-restrictive alternatives, all compel the conclusion that section 16(a) violates the First Amendment.

I. THE BAN ON BROADCAST INDECENCY PRESENTS A QUESTION OF NATIONAL IMPORTANCE

A reading of the majority's opinion below erroneously suggests that all indecent speech is entitled only to the marginal

First Amendment protection given to hard core pornography that is not technically obscene. (12a.) The only specific broadcasts to which the majority refers contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." (6a.) *See also* (17a) (referring to indecent broadcasts as "sexually explicit material just this side of legal obscenity"). By focusing on this litany of graphic sexual and excretory acts, the court of appeals majority seeks to diminish the constitutional magnitude of Congress' actions by suggesting that there is no serious expressive message to be found in any indecent broadcast.

The Court, however, has repeatedly and unambiguously affirmed that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable*, 492 U.S. at 126. Furthermore, what the government may deem "indecent" speech is "not confined merely to material that borders on obscenity -- 'obscenity light'"; rather, it encompasses a wealth of "literarily, artistically, scientifically, and politically meritorious material." *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 130 (D.C. Cir. 1995) (en banc) (Wald, J., dissenting). The FCC's imprecise, generic definition makes this point clear. The Commission has stated that it will consider as "indecent" any

> language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

(104a.) And although the Commission considers the "merit" of a broadcast as "one of many variables" in determining whether particular material is patently offensive, it has "reject[ed] an approach that would hold that if a work has merit, it is *per se* not indecent." *Reconsideration Order*, 3 F.C.C.R. 930 ¶ 17.

Indeed, the Commission's recent actions demonstrate with frightening clarity the wide range of literary, artistic, scientific, and political speech that it may censor, including news stories, informational programs, political advertising, serious drama, motion pictures, musical recordings, satirical material, and works with political and sociological themes.[6/] The works of authors such as petitioner Allen Ginsberg, Walt Whitman, and Norman Mailer, speeches and interviews by cultural figures such as Susan Sontag, a prize-winning biography of Miles Davis, a reading by African-American and

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[6/] The Commission has made clear that a wide range of meritorious programs are not exempt from its indecency regulations. *See, e.g., KSD-FM*, Notice of Apparent Liability, 6 F.C.C.R. 3689 (1990) ("while the newsworthy nature of broadcast material and its presentation in a serious, newsworthy manner would be relevant contextual considerations in an indecency determination, they are not, in themselves, dispositive factors"); *see also* (122a) (noting petitioners' "request to make news and public affairs programs entirely exempt from indecency enforcement" without granting request); *FCC Investigating; Group W Says Indecency Finding Against KYW-TV Philadelphia Would be Censorship*, Communications Daily, Apr. 26, 1993, at 3 (report on FCC investigation of "Jane Wallace Live" television program dealing with Philadelphia adult establishment); Letter to Mr. and Mrs. Ronald Orle from Chief, Mass Media Bureau (Apr. 7, 1988) (reviewing informational program on sex education for teenagers); Letter to Hon. John E. Bourne, Jr., from Chief, Mass Media Bureau (Oct. 26, 1989) (reviewing political advertisement concerning the word "clocksucker" in reference to mayor's desire to purchase clock for City Hall); *Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (play dealing with AIDS and homosexuality), *reconsideration and clarification granted in part, denied in part sub. nom. Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 (1987), *vacated in part and remanded sub. nom. ACT I*, 852 F.2d 1332 (D.C. Cir. 1988); Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988) (reviewing radio presentation of *Ulysses*); *Kansas City Television Ltd.*, Order, FCC 88-274 (released Aug. 5, 1988) (film "Private Lessons"), *vacated*, 4 F.C.C.R. 6706 (1989); *KLUC-FM*, Notice of Apparent Liability, 6 F.C.C.R. 3695 (1990) (recording of song "Erotic City" by Prince); *WLLZ*, Notice of Apparent Liability, 6 F.C.C.R. 3698 (1989) (song satirizing male attitudes toward sexuality).

Korean poets held in the wake of the Rodney King beating, musical genres, such as blues, hip-hop and rap, and a wide range of subjects such as rape, abortion, AIDS, and the experiences of Vietnam War veterans -- none of these are excluded from the specter of severe sanctions. *See* Comments of Pacifica Foundation, et al., GC Docket No. 92-223, at 8-9 (filed with Commission Nov. 6, 1992 and part of record below); *Alliance for Community Media*, 56 F.3d at 129.

Equally as dangerous, broadcasters -- particularly small non-commercial radio stations such as petitioners here -- who fear adverse action by the Commission are likely to engage in self-censorship to screen out television and radio programs of unquestionable social and political merit. For example, the fear of sanctions has caused petitioner Pacifica Foundation to discontinue broadcasting the poems of petitioner Allen Ginsberg, one of the great American poets, whose work is freely broadcast in other nations. To avoid sanctions, Pacifica was also forced to expend scarce staff and costly attorney time editing and expurgating *The Grapes of Wrath* so that it could be broadcast on Thanksgiving Day 1989. *See* Comments of Pacifica Foundation, et al., MM Docket No. 89-494, at 25-26 (filed with Commission Feb. 20, 1990 and part of record below).[7/] In short, the effect of the FCC's indecency ban is to make the airwaves of this country unavailable for its greatest artists, its most influential thinkers, and its most sensitive issues.

Indeed, it is precisely because the Commission's definition of indecency sweeps so broadly that the contours of a reasonable safe harbor when indecent programs may permissibly be broadcast is an issue of critical constitutional magnitude. In *ACT I*, petitioners challenged the FCC's definition of indecency as vague and overbroad. Then Judge

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[7/] The risk of self-censorship is all the more probable given the FCC's statutory authority to impose hundreds of thousands of dollars in civil forfeitures, which may take years to be judicially reviewed. *See South Fork Broadcasting Corp.* v. *FCC*, 59 F.3d 1249 (D.C. Cir. 1995).

Ginsburg noted petitioners' arguments with concern, but held that *Pacifica* precluded an "an inferior court from addressing this question on the merits" and that the issue should be resolved by "Higher Authority." 852 F.2d at 1338, 1339. In invalidating the FCC's 6 a.m. to midnight ban on indecent broadcasts, however, Judge Ginsburg concluded that, taken together, the "uncertainty generated by a less than precise definition of indecency" *plus* the absence of a "securely-grounded channeling rule" unduly infringed the rights of Americans to receive protected expression. *Id.* at 1342, 1344. In short, "the chill brought about by the Commission's open-textured definition of indecency" makes a reasonable safe harbor a constitutional necessity. (61a) (Wald, J., dissenting).

In determining the constitutional contours of the safe harbor, the Court's decision in *Sable* is instructive. In that case, the Court unanimously struck down a total ban on telephone transmissions of indecent speech to adults as a violation of the First Amendment. 492 U.S. at 126-31. The government asserted that a total ban was the most effective, indeed, the *only* completely effective means to achieve its compelling objective of protecting children from exposure to indecent telephone communications. The Court dismissed this argument as "quite unpersuasive." *Id.* at 128. Although accepting that anything short of the total ban would not be "fail-safe" or "foolproof," *id.* at 130-31, n.10, the Court nevertheless concluded that the flat ban was unconstitutional because its "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages." *Id.* at 131. *Sable* thus demonstrates that even if a regulation is the most effective means of achieving the government's compelling interests, it will still violate the First Amendment if it burdens substantial amounts of speech that are not obscene by adult standards.

Although *Sable* did not address the propriety of a less than total ban on indecent speech, the Court suggested that such a restriction can pass constitutional muster only if it does not

"den[y] adults their free speech rights by allowing them to [see and hear] only what [i]s acceptable for children." *Id.* at 127. *See also Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983); *Butler* v. *Michigan*, 352 U.S. 380, 383-84 (1957). Accordingly, any safe harbor Congress creates and the FCC implements must, at a minimum, allow adults a meaningful opportunity to receive the wide variety of socially significant speech that may be transmitted over the Nation's airwaves.

The Telecommunications Act's 6 a.m. to midnight broadcast ban manifestly does not satisfy this constitutional requirement. As the evidence submitted to the Commission demonstrates, the ban bars television and radio broadcasts during those hours when the overwhelming majority of American adults are listening.[8/] It is unrealistic to expect that the millions of adults who do not currently watch television or listen to the radio after midnight could or would rearrange their lives to benefit from a safe harbor limiting indecent speech to the wee hours of the morning. In short, as then Judge Ginsburg concluded in *ACT I*, 852 F.2d at 1335, the 6 a.m. to midnight broadcast ban "stretch[es] to all but the hours most listeners [and viewers] are asleep" and thus "effectively denies adults access to constitutionally-protected material."[9/]

[8/] For example, the audience for the four commercial broadcast networks (ABC, CBS, NBC, and FOX) drops sharply after midnight: while 47.0 million adults view network-affiliated stations between 10 p.m. and 11 p.m., only 16.9 million adults do so between midnight and 1:00 a.m. *See* Nielsen Television Index (Second Quarter 1992). Similarly, while 11.7 million adults listen to radio between 10 p.m. and 11 p.m., only 7.4 million do so between midnight and 1 a.m. *See* RADAR 45 (Spring 1992) (figures based on audience per quarter hour). The audiences decrease still further after 1:00 a.m. *Id.*

[9/] The court of appeals majority conceded that "the number of adults watching television and listening to radio after midnight are admittedly small," but found this fact to be of no constitutional importance in light of the "alternatives means" adults have of "satisfying

II. THE COURT'S PRECEDENTS DO NOT SUPPORT A MIDNIGHT TO 6 A.M. BAN ON INDECENT BROADCASTS

The court of appeals majority relied on the Court's decision in *Pacifica* as providing critical support for Congress' power to restrict indecent broadcasts. Emphasizing the Court's statements concerning the broadcast media's "uniquely pervasive presence in the lives of all Americans," including children, 438 U.S. at 748, the majority concluded that "radio and television broadcasts may properly be subject to different -- and often more restrictive -- regulation than is permissible for other media under the First Amendment." (12a.)

Pacifica is too slender a reed to support the majority's analysis. In that case, the Court upheld an FCC decision labeling as indecent a monologue by entertainer George Carlin entitled "Filthy Words" broadcast over the radio at 2 o'clock in the afternoon. 438 U.S. at 734-35, 750-51. The Court's decision was an explicitly circumscribed one, upholding only the FCC's ruling that sanctioned the broadcast of specific words in a specific context at a particular time of day. Indeed, the Court went out of its way "to emphasize the narrowness of our holding." *Id.* at 750. The Court also expressly refused to

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their interest in indecent materials." (23a.) Contrary to the majority's suggestion, millions of Americans do not have access to these alternative means of expression. *See, e.g., TBS*, 114 S. Ct. at 2454, 2461 (noting that forty percent of Americans do not subscribe to cable). Moreover, First Amendment jurisprudence does not sanction a restriction of protected speech in one medium by reference to other media. *See, e.g., Schneider* v. *New Jersey*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the ground that it may be exercised in some other place"). Indeed, reliance on alternative media could just as easily be asserted in support of a total ban on indecent speech, which cannot survive constitutional scrutiny under *Sable* and *ACT II*. It follows that the midnight to 6 a.m. safe harbor must be analyzed solely by reference to the broadcast media.

address whether "broadcast audiences in the late evening contain so few children that playing this monologue would be permissible . . . ." *Id.* at 750, n.28.

Recent decisions of the Court confirm this circumscribed reading of *Pacifica*. In *Sable*, the Court expressly reaffirmed that its holding in *Pacifica* was an "emphatically narrow" one. 492 U.S. at 127. And just two terms ago, the Court further confined *Pacifica* to its facts, reiterating the dangers of governmental censorship of the broadcast media. *See TBS*, 114 S. Ct. 2445.

In *TBS*, the Court considered the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992 that required cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. Although the Court characterized the appellants' concerns about content-based regulation of speech as unfounded "in the present regulatory system," it was careful to leave open the possibility that such arguments "might carry greater weight" "[i]n a regime where Congress or the FCC exercised more intrusive control over the content of broadcast programming":

> [O]ur cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices. See *FCC* v. *League of Women Voters of Cal.*, 468 U.S., at 378-380, 386-392, 104 S.Ct., at 3116-3118, 3120-3124 (invalidating under the First Amendment statute forbidding any noncommercial educational statute that receives grant from the [Corporation for Public Broadcasting] to "engage in editorializing"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S., at

> 136, 93 S.Ct., at 2098 (describing "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" as being of "critical importance" to the First Amendment).

Id. at 2464.

The court of appeals majority ignored these crucial statements in *TBS* as well as the Court's reassertion of the well-settled constitutional rule that courts must "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content." *TBS*, 114 S. Ct. at 2459. Only by misconstruing *Pacifica* broadly and ignoring the Court's subsequent narrow interpretation of that case could the court of appeals fail to recognize that the 6 a.m. to midnight broadcast ban is precisely the sort of "intrusive control over the content of broadcast programming" that raises the most serious First Amendment concerns.[10/]

[10/] The Court in *TBS* declined to reconsider the "spectrum scarcity" rationale articulated in *Pacifica* to support greater regulation of broadcast media than other modes of expression, notwithstanding the repeated criticism of courts and commentators. 114 S. Ct. at 2457. However, the Court did express profound concern over situations, such as here, where "Congress or the FCC exercise[] . . . intrusive control over the content of broadcast programming." *TBS*, 114 S. Ct. at 2464. Thus, even assuming the validity of spectrum scarcity, the 6 a.m. to midnight ban on indecent broadcasts is a "presumptively invalid" content-based regulation of speech, *R.A.V.* v. *City of Saint Paul*, 112 S. Ct. at 2542, which "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *TBS*, 114 S. Ct. at 2458. Indeed, it is precisely because of broadcast's "uniquely pervasive presence in the lives of all Americans," *Pacifica*, 438 U.S. at 748, that the government cannot be permitted to censor the content of what is broadcast based upon its subjective view of what most Americans would prefer to have excluded from their homes.

III. THE 6 A.M. TO MIDNIGHT BAN IS UNSUPPORTED BY ANY EVIDENCE OF HARM TO MINORS AND IS NOT NARROWLY TAILORED TO SERVE THE GOVERNMENT'S ASSERTED INTERESTS

The constitutional standards applicable to content-based regulations of speech are well settled. Where, as here, "the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease to be cured." *TBS*, 114 S. Ct. at 2470. Rather, it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id. See also FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 391 (1984).[11/] In addition, the government must assess "the actual effects of [the regulation] on the speech of [those who are regulated]" and consider "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving [its] asserted interests" to avoid imposing unnecessary burdens on protected speech. *TBS*, 114 S. Ct. at 2472 (quoting *Sable*, 492 U.S. at 129).

In undertaking this analysis, although a court must give "substantial deference" to "Congress' predictive judgments," those judgments are not "insulated from meaningful judicial review altogether." *TBS*, 114 S. Ct. at 2471. On the contrary, where First Amendment freedoms are at stake, "the deference afforded to legislative findings does 'not foreclose [a court's] independent judgment of the facts bearing on an issue of

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11/ The Supreme Court has applied these same evidentiary standards in cases involving commercial speech. *See, e.g., Coors Brewing Co.*, 115 S. Ct. at 1592-93; *Edenfield*, 113 S. Ct. at 1800. Given that regulations of commercial speech merit only intermediate scrutiny under the First Amendment, it follows *a fortiori* that a content-based regulation requiring strict scrutiny must, at a minimum, meet the same evidentiary hurdles.

constitutional law.' This obligation to exercise independent judgment when First Amendment Rights are implicated . . . is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on *substantial evidence*." *Id.* at 2471 (quoting *Sable*, 492 U.S. at 129) (citations omitted) (emphasis added).

In its enforcement order and before the court of appeals, the Commission asserted two principal interests in support of the 6 a.m. to midnight ban: (1) an interest in shielding children from the harm of exposure to indecent broadcasts, and (2) an interest in helping parents supervise their children. (107a-110a.)[12/] The government has failed to satisfy its burden of demonstrating that the broadcast ban in fact serves those interests or is carefully tailored to limit its deleterious effect on First Amendment freedoms.

A. There Is No Evidence That Broadcast Indecency Harms Children

While the Court has recognized that the government has "a compelling interest in protecting the physical and psychological well-being of minors," *Sable*, 492 U.S. at 126, no causal nexus has been established between broadcast indecency and any physical or psychological harm to minors. The court of appeals majority erroneously accepted the government's claim that harm to children from purportedly indecent speech may be presumed as a matter of law, relying on *Ginsberg* v.

12/ The Commission also asserted a third interest in protecting adults from exposure to indecent speech in the privacy of their own homes. (110a.) Although the en banc court of appeals did not address this issue given its analysis of the first two interests (13a), the panel properly rejected the Commission's argument as violating "the fundamental principle of the First Amendment 'that debate on public issues should be uninhibited, robust and wide-open.'" (80a) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)).

New York, 390 U.S. 629 (1968). *Ginsberg* does not support such a conclusion.

The Court there upheld a state statute forbidding the sale to minors under 17 of literature defined as obscene for them, even where such materials were "not obscene for adults." *Id.* at 634. It did not rule that indecent speech causes harm to minors. Rather, it wrestled with the question whether the legislature's definition and prohibition of obscene materials on the basis of their prurient appeal to minors was rationally related to its finding that such materials impaired their ethical and moral development. *Id.* at 641. Inasmuch as obscenity lies beyond the outermost ambit of First Amendment protection, the Court could not conclude that the statute's regulation of *obscenity* had "no rational relation to the objective of safeguarding such minors from harm." *Id.* at 643. This case, unlike *Ginsberg*, concerns speech that is fully protected by the First Amendment and thus must be analyzed under the strictest, rather than the most lenient, standard of review. *See Sable*, 492 U.S. at 126.

Furthermore, in refusing to require any evidence of harm to minors from indecent speech, the court of appeals majority departed from the requirement in *TBS* and other cases that the government "must do more than simply posit the existence of the disease to be cured." *TBS*, 114 S. Ct. at 2470 (quotations omitted). Not only is the presumption of harm inconsistent with this constitutional mandate, but the record here does not contain *any* evidence of harm to children resulting from exposure to indecent broadcasts. Of the eight articles and reports to which the Congressional sponsors of the broadcasting ban refer and to which the FCC cites, five involve violence, not indecency,[13] and

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[13] *See* (112a) (citing 138 Cong. Rec. at S7309-10 (June 2, 1992) (statement of Sen. Helms) (citing studies: *Surgeon General's Scientific Advisory Committee on Television and Social Behavior, Television and Growing Up: the Impact of Televised Violence* (U.S. Pub. Health Serv., 1972); Aimee D. Leifer & Donald F. Roberts, *Children's Responses to Television Violence*, in 2 Television and Social Behavior 43-180 (U.S.

the remaining three discuss sexual materials but do not account for any harm.[14/] These sources do not even attempt to document any causal relationship between broadcast indecency and harm to children. Indeed, at the oral argument before the en banc court of appeals, "counsel for the Commission was unable to cite to any study that found a causal connection between exposure to indecent broadcast and psychological or other harm to children." (55a) (Edwards, C.J., dissenting).

Even assuming *arguendo* that the government has a compelling interest in protecting children from exposure to purportedly indecent speech, the court of appeals majority wholly ignored that in acting to suppress constitutionally protected speech, the government must take into account the First Amendment rights of adult viewers and minors and must narrowly tailor its protection of children to avoid infringement of those rights. *See TBS*, 114 S. Ct. at 2472. As the record here clearly demonstrates, the government utterly failed to meet these constitutional requirements.

First, there is simply no evidence that in fixing the boundaries of the broadcast ban the government considered the First Amendment rights of adults. Indeed, the record indicates

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Dep't of Health, Educ., and Welfare, John P. Murray et al. eds., 1972); Robert M. Liebert, *Television and Social Learning: Some Relationships Between Viewing Violence and Behaving Aggressively*, in 2 Television and Social Behavior 1-42; Ellen Coughlin, *Is Violence on TV Harmful To Our Health? Some Scholars, a Vocal Minority, Say No*, The Chron. Of Higher Educ., Mar. 13, 1985, at 5; Erik Eckholm, *Studies Link Teen-Age Suicides*, TV, N.Y. Times, Sept 11, 1986, at C13)).

[14/] *See* (112a) (citing 138 Cong. Rec. at S7309-10 (citing studies: Shearon A. Lowery & Melvin L. De Fleur, *Milestones in Mass Communication Research: Media Effects* 406-07 (2d ed. 1983); Elizabeth J. Roberts, *Television and Sexual Learning in Childhood*, in 2 Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties 209-23 (Nat'l Inst. of Mental Health, David Pearl et al. eds., 1982); 1 Television and Behavior 87 (Summary Report))).

precisely the contrary. The main principle guiding Congress' determination of the boundaries of the broadcast ban was to find a time when "the risk of children in the broadcast audience would be . . . lessened." 138 Cong. Rec. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd). *See also* (125a-126a). By focusing exclusively on the number of children in the audience, the government failed to take into account the First Amendment rights of adults viewers and listeners in receiving constitutionally protected speech. Instead, the 6 a.m. to midnight ban was arrived at solely on the basis that fewer children are in the broadcast audience between the hours of midnight and 6 a.m. than other times. As the panel decision notes, the same judgment could even more assuredly been used to support a 1:00 a.m. to 5:00 a.m. or 3:00 a.m. to 4:00 a.m. safe harbor. (94a.) What the Constitution requires, however, is a safe harbor in which there are few unsupervised young children in the audience but in which adult viewers and listeners have a meaningful opportunity to receive constitutionally protected speech while still awake.

Second, and equally significant, the government failed to consider the First Amendment rights of minors. The Court has consistently held that minors "are entitled to a significant measure of First Amendment protection," *Bolger*, 463 U.S. at 74, n.30 (quotations omitted). Indeed, in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), the Court specifically held that minors, particularly older minors, have First Amendment rights to receive indecent material. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 213-14. Rather, "[i]n most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Id.* at 214 (footnote omitted). *See also Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 692, n.14 (1977) ("minors are entitled to constitutional protection for freedom of

speech"); *Tinker* v. *Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.").

Here, the record contains absolutely no evidence that the government considered the First Amendment interests of maturing minors and tailored the boundaries of its broadcast ban accordingly. The government simply asserted that it had an interest in protecting all "children" under 18 from indecent broadcasts and decided to treat all children under 18 as a single indiscriminate class for purposes of the broadcast ban. But it offered no reasoned analysis or evidentiary basis for doing so. *See* 138 Cong. Rec. S7308 (daily ed. June 2, 1992). Nor did it demonstrate why its purported interest in shielding children from indecent broadcasts automatically outweighs the child's own First Amendment rights up to her eighteenth birthday.

What is more, it is absurd for the government to presume that "indecent" expression harms older children who are regularly exposed in junior high school, high school, and college to frank and detailed discussions of subjects such as sex education, sexually transmitted diseases, and the works of authors such as John Steinbeck, James Baldwin, Allen Ginsberg, J.D. Salinger, and Alice Walker. That public authorities have found these topics to be valuable for children's education and development makes the Commission's presumption of harm from broadcast indecency at best facetious.

Given the government's failure to satisfy the careful review and evidentiary hurdles *TBS* mandates or to consider the First Amendment rights of adults and older minors, the 6 a.m. to midnight broadcast ban cannot survive constitutional scrutiny. Indeed, if the "unusually detailed statutory findings" in *TBS* were insufficient to survive *intermediate* scrutiny, 114 S. Ct. at 2461, it follows *a fortiori* that the government's arguments cannot satisfy the more stringent test applicable to content-based regulations of purportedly indecent speech, such as the ban here.

B. The Safe Harbor Is Insufficiently Tailored To Serve The Government's Interest In Facilitating Parental Supervision Of Children

The second compelling governmental interest the Commission identified and the court of appeals accepted is the interest in facilitating parents' ability to supervise their children. Rather than attempting to determine whether the 6 a.m. to midnight ban was the most narrowly tailored means of achieving that interest, the majority simply accepted the Commission's assertion that, in light of the number of children under 17 who have television sets or radios in their own rooms, parents are unable to exercise "effective" control over the watching and listening activities of their children. (14a.)

Contrary to the majority's analysis, the relevant constitutional inquiry is whether parents have the *opportunity* to exercise control over their children, not whether that control eliminates all risk of exposure to indecency. In *Bolger*, the Court struck down a statute prohibiting advertisers from mailing unsolicited advertisements for contraceptives to home addresses because the ban was not narrowly drawn to achieve the government's interest. Although the government asserted that the statute was designed to "aid[] parents' efforts to discuss birth control with their children," the Court reasoned that the statute "provides only the most limited incremental support for the interest asserted." 463 U.S. at 73. Like the broadcast ban at issue here, the statute burdened *all* adults by making it more difficult for them to receive constitutionally protected speech, while aiding only the narrow class of parents "who desire to keep their children from confronting such mailings, [but] who are otherwise unable to do so." *Id.* *Bolger* teaches that the government may not restrict indecent speech for adults by arguing that parents are not in a position to supervise effectively their children's access to such speech. To the contrary, where "material that is entirely suitable for adults" is concerned, courts must presume that the overwhelming majority of parents are in

a position to engage in such supervision. *Id.*[13/]

The court of appeals majority also erred in accepting that the government's asserted interest in the well-being of children extends to regulating children's access to indecent speech contrary to their parents' wishes. The court merely presumed that all parents desire to shield their children from indecency but are unable as a practical matter to do so, thereby permitting the government to take over their function as arbiter of what children should see and hear. Such a presumption conflicts with decades of judicial precedent.

In *ACT I*, then Judge Ginsburg properly identified the government's interest as assisting parents in choosing which programs their children should be exposed to as a means of promoting "parental -- *as distinguished from government* -- control." 852 F.2d at 1344 (emphasis added). *See also id.* at 1343 (noting that government had disavowed any interest in "act[ing] *in loco parentis* to deny children access *contrary to* parents' wishes"). This articulation of the government's compelling interest accords with the constitutional right of parents to rear their children in the manner they see fit, *see, e.g., Runyon* v. *McCrary*, 427 U.S. 160, 177 (1976); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer* v.

13/ The empirical data submitted to the Commission supports the conclusion that parents and guardians are in a position to supervise their children should they choose to do so. The uncontroverted evidence in the record demonstrates that there are virtually no unsupervised children in the broadcast audience during much of the day. For example, throughout the 8 p.m. to 6 a.m. safe harbor that the Commission has enforced since 1989, at least 98% of all persons under age 18 are in the presence of parents or other adults, at school, or asleep. *See* Comments of Action for Children's Television, et al., MM Docket No. 89-494, at 32-33 & Appendix C (filed with Commission Feb. 20, 1990 and made part of record below). And during the 10 p.m. to 6 a.m. period that served as the safe harbor in the decade following *Pacifica*, more than 93% of children were under parental supervision and more than 99% were under adult supervision. *Id.*

Nebraska, 262 U.S. 390, 400-02 (1923). This constitutionally-protected right, which includes a parent's decision to expose children to indecent speech, can be limited only in narrow circumstances, namely, when "it appears that parental decisions will jeopardize the heath or safety of the child, or have a potential for significant social burdens." *Wisconsin* v. *Yoder*, 406 U.S. 205, 234 (1972). *See also Prince* v. *Massachusetts*, 321 U.S. 158, 169-70 (1944).

An eighteen-hour ban on indecent broadcasts that extends to virtually all hours when parents and children are awake manifestly does not serve this interest. As Chief Judge Edwards cogently explained in *Alliance for Community Media*, 56 F.3d at 145-46:

> [A] law that effectively *bans* all indecent programming . . . does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming.

In regulating indecent expression then, the government's compelling interest must be to maximize -- rather than to preempt -- parental choice while taking into account the First Amendment rights of adults and older children. The record is devoid of any sign of this constitutionally-mandated analysis. The Commission has not adduced any evidence to document actual parental supervision, parental preferences, or the effectiveness of parental control at different times during the day and evening, evidence that might permissibly be used to justify a less intrusive indecency ban. (56a) (Edwards, C.J.,

dissenting).[16/] Without giving more careful consideration to those hours of the day and evening when parental control could reasonably be relied upon in lieu of government regulation, the Commission's blanket censorship of indecent speech cannot withstand First Amendment scrutiny.

Equally fatal to the government's position is the absence of any mention of less speech-restrictive alternatives to the eighteen-hour ban that could as effectively serve its asserted interest in aiding parental supervision. In its enforcement order, the Commission merely asserts, without elaboration, that its broadcast ban is the least restrictive means available and that other alternatives do not effectively further the government's interests. (130a.) Strikingly, the Commission makes no mention of any such alternatives, or of the differing ways in which children listen to radio as compared to watching television.[17/] If the "exacting scrutiny" mandated by *TBS* and

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16/ Nor has the Commission cited to any station-specific or program-specific data -- as opposed to data on children in the overall broadcast audience -- that could support a more narrowly tailored safe harbor, notwithstanding the fact that such data already exists. *See ACT II*, 932 F.2d at 1510. The Commission simply concluded, and the court of appeals agreed, that such information "is not instructive because it does not account for children's grazing," which involves random and rapid tuning "through the entire channel menu in a short period of time." (128a.) There is no evidence in the record, however, that grazing leads to any significant viewing of indecent broadcasts.

17/ For example, there is uncontradicted evidence that the number of children listening to public radio stations is statistically insignificant. The teenage audience listening to public radio accounts for merely 0.2% of teen listening generally and to virtually no percentage of total radio listening. *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297, 5303 (1990). The evidence reveals that children use radio differently than adults and only gradually learn to use radio as a medium. *See* Comments of Pacifica Foundation, et al., GC Docket No. 92-223, at Attachment A (filed with the Commission Nov. 6, 1992 and part of record below). In fact, young

Sable means anything at all, the Commission must, at a minimum, consider "constitutionally acceptable less restrictive means," including a narrower ban specifically tailored to radio broadcasts, before finding that the means chosen is the least restrictive available.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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children up to 8 years old do not, for the most part, use radio. Access is primarily a secondary experience as the child hears radio selections chosen by his or her parents or others. Pre-teens (ages 8 to 11), even when given independent access to radio, generally prefer other media, such as television, or other forms of audio entertainment such as pre-recorded cassettes or CDs. *Id.* Teen use of radio lags far behind that of adults. Teens listen to approximately one-third less radio than any other age group. The weekly "cume" for teen listening to public radio is less than five percent. This means that fewer than one in twenty teens tunes into a public radio station for five minutes or more per week. *Id.*

As for television, the FCC has utterly ignored the existence of blocking technology in which a so-called "V-chip" is placed in television sets that allows parents to screen out programs or channels of their choice. This new technology is "undoubtedly less speech-restrictive" than a blanket broadcast ban and provides more effective supervision by "allowing parents to choose what programs or stations to block." (57a) (Edwards, C.J., dissenting).

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued En Banc October 19, 1994
Decided June 30, 1995

No. 93–1092

ACTION FOR CHILDREN'S TELEVISION;
AMERICAN CIVIL LIBERTIES UNION;
THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.;
CAPITAL CITY/AMERICAN BROADCASTING CO., INC.;
CBS, INC.; FOX TELEVISION STATIONS, INC.;
GREATER MEDIA, INC.; INFINITY BROADCASTING CORPORATION;
MOTION PICTURE ASSOCIATION OF AMERICA, INC.;
NATIONAL ASSOCIATION OF BROADCASTERS;
NATIONAL PUBLIC RADIO; PEOPLE FOR THE AMERICAN WAY;
POST-NEWSWEEK STATIONS, INC.; PUBLIC BROADCASTING SERVICE;
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION;
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
SOCIETY OF PROFESSIONAL JOURNALISTS,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 93–1100

PACIFICA FOUNDATION;
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS;
AMERICAN PUBLIC RADIO;
NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS;
INTERCOLLEGIATE BROADCAST SYSTEM; PEN AMERICAN CENTER;
ALLEN GINSBERG,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

Petitions for Review of an Order of the
Federal Communications Commission

Timothy B. Dyk, with whom *Barbara McDowell* was on the briefs, argued the cause for petitioners Action for Children's Television, *et al.*

Eric M. Lieberman, with whom *Thomas C. Viles* and *John P. Crigler* were on the briefs, argued the cause for petitioner Pacifica Foundation.

Marjorie Heins was on the briefs for petitioner American Civil Liberties Union. *Steven R. Shapiro* entered an appearance.

James J. Popham was on the briefs for petitioner The Association of Independent Television Stations, Inc.

Molly Pauker was on the briefs for petitioner Fox Television Stations, Inc.

Dennis P. Corbett, *Laura B. Humphries*, and *Steven A. Lerman* were on the briefs for petitioner Infinity Broadcasting Corporation.

Henry L. Bauman was on the briefs for petitioner National Association of Broadcasters.

Theodore A. Miles was on the briefs for petitioner National Public Radio. *Karen Christensen* entered an appearance.

Andrew J. Schwartzman and *Elliot M. Mincberg* were on the briefs for petitioner People for the American Way.

Martin Wald and *Jonathan D. Blake* entered appearances for petitioner Post-Newsweek Stations, Inc.

Nancy H. Hendry and *Paula A. Jameson* were on the briefs for petitioner Public Broadcasting Service.

Joseph L. Scharff was on the briefs for petitioner Radio-Television News Directors Association.

Jane E. Kirtley was on the briefs for petitioner Reporters Committee for Freedom of the Press.

Bruce W. Sanford and *Henry S. Hoberman* were on the briefs for petitioner Society of Professional Journalists.

Christopher J. Wright, Deputy General Counsel, Federal Communications Commission ("FCC"), with whom *William E. Kennard*, General Counsel, and *Daniel M. Armstrong*, Associate General Counsel, FCC, and *Assistant Attorney General Frank W. Hunger* and *Barbara L. Herwig* and *Jacob M. Lewis*, Attorneys, U.S. Department of Justice, were on the briefs, argued the cause for respondents. *Jane E. Mago*, *Clifford G. Pash, Jr.*, *Renee Licht*, and *Peter Anthony Tenhula*, Counsel, FCC, entered appearances for respondents.

Before EDWARDS, *Chief Judge*, and WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY, in which *Circuit Judges* SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, and RANDOLPH concur.

Dissenting opinion filed by *Chief Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* WALD, in which *Circuit Judges* ROGERS and TATEL join.

BUCKLEY, *Circuit Judge*: We are asked to determine the constitutionality of section 16(a) of the Public Telecommunications Act of 1992, which seeks to shield minors from indecent radio and television programs by restricting the hours within which they may be broadcast. Section 16(a) provides that, with one exception, indecent materials may only be broadcast between the hours of midnight and 6:00 a.m. The exception permits public radio and television stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m.

We find that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts. We are also satisfied that, standing alone, the "channeling" of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment. Because the distinction drawn by Congress between the two categories of broadcasters bears no apparent relationship to the compelling Government interests that section 16(a) is intended to serve, however, we find the more restrictive limitation unconstitutional. Accordingly, we grant the petitions for review and remand the cases to the Federal Communications Commission with instructions to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.

I. BACKGROUND

The Radio Act of 1927 provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio

communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1988). While all obscene speech is indecent, not all indecent speech is obscene. The Supreme Court has defined obscene material as

> works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973). In enforcing section 1464 of the Radio Act, the Federal Communications Commission defines "broadcast indecency" as

> language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705 n.10 (1993) ("*1993 Report and Order*"). This definition has remained substantially unchanged since it was first enunciated in *In re Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975).

While obscene speech is not accorded constitutional protection, "[s]exual expression which is indecent but not obscene is protected by the First Amendment...." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). "The Government may, however, regulate the content of [such] constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* Noting that broadcasting has received the most limited First Amendment protection because of its unique pervasiveness and accessibility to children, the Supreme Court has held that the FCC may, in appropriate circumstances, place restrictions on the broadcast of indecent speech. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750–51 (1978) ("when the Commission finds that a

pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.").

In *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 (1987) ("*Reconsideration Order*"), the Commission reviewed its decisions in three cases: *In re Infinity Broadcasting Corp. of Pa.*, 2 F.C.C.R. 2705 (1987), *In re Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698 (1987), and *In re Regents of the University of California*, 2 F.C.C.R. 2703 (1987). One of these cases involved a morning broadcast; the other two dealt with programs that were aired after 10:00 p.m. In each of them, the agency found that a radio station had introduced particularly offensive pigs into American parlors in violation of section 1464. The offending morning broadcast, for example, contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." *Reconsideration Order*, 3 F.C.C.R. at 932 (internal quotation marks omitted). The remaining two were similarly objectionable. *See id.* at 932–33.

The FCC reaffirmed the Government interest in safeguarding children from exposure to such speech and placed broadcasters on notice that because

> at least with respect to the particular markets involved, available evidence suggested there were still significant numbers of children in the audience at 10:00 p.m. ... broadcasters should no longer assume that 10:00 p.m. is automatically the time after which indecent broadcasts may safely be aired. Rather, ... indecent material would be actionable (that is, would be held in violation of 18 U.S.C. § 1464) if broadcast when there is a reasonable risk that children may be in the audience....

Id. at 930–31. The Commission noted, however, that it was its "current thinking" that midnight marked the time after which

> it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience.

Id. at 937 n.47.

In our review of the *Reconsideration Order* in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*"ACT I"*), we rejected the argument that the Commission's definition of indecency was unconstitutionally vague and overbroad. *Id.* at 1338–40. But although we affirmed the declaratory ruling that found portions of the morning broadcast to be in violation of section 1464, *id.* at 1341, we vacated the Commission's rulings with respect to the two post–10:00 p.m. broadcasts. *Id.* In those instances, we considered the findings on which the Commission rested its decision to be "more ritual than real," *id.*, because the Commission had relied on data as to the number of teenagers in the total radio audience rather than the number of them who listened to the radio stations in question. We were also troubled by the FCC's failure to explain why it identified the relevant age group as children aged 12 to 17 when it had earlier proposed legislation for the protection of only those under 12. *Id.* at 1341–42. We further concluded that "the FCC's midnight advice, indeed its entire position on channeling, was not adequately thought through." *Id.* at 1342.

Two months after our decision in *ACT I*, Congress instructed the Commission to promulgate regulations "enforc[ing] the provisions of . . . section [1464] on a 24 hour per day basis." Pub. L. No. 100–459, § 608, 102 Stat. 2186, 2228 (1988). The Commission complied by issuing a regulation banning all broadcasts of indecent material, which was immediately challenged by Action for Children's Television and others. The following year, we remanded the record to the Commission to enable it to solicit information relevant to the congressionally mandated 24-hour ban; and in 1989, the FCC issued a "Notice of Inquiry" for that purpose. *In re Enforcement of*

Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 4 F.C.C.R. 8358 (1989) ("*1989 NOI*").

After analyzing the public comment received in response to the *1989 NOI*, the Commission reported its conclusions in *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 F.C.C.R. 5297 (1990) ("*1990 Report*"). In the *1990 Report*, the FCC defined the category of persons to be protected under section 1464 as "children ages 17 and under." *Id.* at 5301. It then found that because

> the narrowness with which courts have interpreted "obscenity" has commensurably broadened the range of patently offensive material that could be deemed "indecent" if broadcast ... [and in light of the evidence] that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of day and night[,] ... the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24–hour prohibition.

Id. at 5297.

We reviewed the 24–hour ban in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) ("*ACT II*"). We again rejected petitioners' vagueness and overbreadth arguments, but we struck down the total ban on indecent broadcasts because "[o]ur previous holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely." *Id.* at 1509.

Shortly after the Supreme Court denied certiorari in *ACT II*, 112 S. Ct. 1281 (1992), Congress again intervened, passing the Public Telecommunications Act of 1992, Pub. L. No. 102–356, 106 Stat. 949 (1992). Section 16(a) of the Act requires the Commission to

promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

47 U.S.C. § 303 note (Supp. IV 1992). Pursuant to this congressional mandate, the Commission published a notice of proposed rulemaking, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 7 F.C.C.R. 6464 (1992), and, in 1993, it issued regulations implementing section 16(a). *1993 Report and Order*, 8 F.C.C.R. at 711; 47 C.F.R. § 73.3999 (1994). These are challenged in the petition now before us.

II. Discussion

Petitioners present three challenges to the constitutionality of section 16(a) and its implementing regulations: First, the statute and regulations violate the First Amendment because they impose restrictions on indecent broadcasts that are not narrowly tailored to further the Government's interest, which petitioners define as the promotion of parental authority by shielding unsupervised children from indecent speech in the broadcast media; second, section 16(a) unconstitutionally discriminates among categories of broadcasters by distinguishing the times during which certain public and commercial broadcasters may air indecent material; and third, the Commission's generic definition of indecency is unconstitutionally vague. Petitioners also assert that our decisions in *ACT I* and *ACT II* compel the rejection of the newly enacted restrictions both because there are insufficient data to justify the new statutory ban and because the Commission continues to include children ages 12 to 17 in the protected class.

The Commission argues that the Government's interests extend beyond facilitating parental supervision to include protecting children from exposure to indecent broadcasts and

safeguarding the home from unwanted intrusion by such broadcasts. The Commission asserts that restricting indecent broadcasts to the hours between midnight and 6:00 a.m. is narrowly tailored to achieve these compelling governmental interests. It defends the exception allowing public stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m. on the basis that these stations would otherwise have no opportunity to air indecent programs.

At the outset, we dismiss petitioners' vagueness challenge as meritless. The FCC's definition of indecency in the new regulations is identical to the one at issue in *ACT II*, where we stated that "the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [Commission's] definition," as did our holding in *ACT I*. 932 F.2d at 1508. Petitioners fail to provide any convincing reasons why we should ignore this precedent.

We now proceed to petitioners' remaining constitutional arguments.

A. The First Amendment Challenge

It is common ground that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable*, 492 U.S. at 126. The Government may, however,

> regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.

Id. Thus, a restriction on indecent speech will survive First Amendment scrutiny if the "Government's ends are compelling [and its] means [are] carefully tailored to achieve those ends." *Id.*

The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems.... [O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748 (citation omitted). The

Court has identified two reasons for this distinction that are relevant here:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. ... Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. ...
>
> Second, broadcasting is uniquely accessible to children.... Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. ... The ease with which children may obtain access to broadcast material, coupled with the concerns [over the well-being of youths] recognized in *Ginsberg [v. New York*, 390 U.S. 629 (1968)], amply justifies special treatment of indecent broadcasting.

Id. at 748–50. As Justice Powell observed in *Pacifica*,

> [t]he difficulty is that ... a physical separation of the audience [such as that possible in bookstores and movie theaters] cannot be accomplished in the broadcast media. ... This ... is one of the distinctions between the broadcast and other media ... [that] justif[ies] a different treatment of the broadcast media for First Amendment purposes.

438 U.S. at 758 (Powell, J., concurring in part and concurring in the judgment). Despite the increasing availability of other means of receiving television, such as cable (which is not immune to the concerns we address today, *see Alliance for Community Media v. FCC*, No. 93–1169, slip op. at 32–34 (D.C. Cir. June 6, 1995)), there can be no doubt that the traditional broadcast media are properly subject to more

regulation than is generally permissible under the First Amendment.

Unlike cable subscribers, who are offered such options as "pay-per-view" channels, broadcast audiences have no choice but to "subscribe" to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material. *See Pacifica*, 438 U.S. at 748–49. This is "manifestly different from a situation" where a recipient "seeks and is willing to pay for the communication...." *Sable*, 492 U.S. at 128; *see also Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (distinguishing *Pacifica* from cases in which cable subscriber affirmatively elects to have specific cable service come into home).

In light of these differences, radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast medium.

1. The compelling Government interests

In examining the Government's interests in protecting children from broadcast indecency, it is important to understand that hard-core pornography may be deemed indecent rather than obscene if it is "not patently offensive" under the relevant contemporary community standards. The Second Circuit, for example, has found that the "detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation" contained in a grab bag of pornographic materials (which included such notorious films as "Deep Throat") are not obscene in light of the community standards prevailing in New York City. *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 134, 137 (2d Cir. 1983). Therefore, as Justice Scalia has observed,

> [t]he more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "indecency," the

> more reasonable it becomes to insist upon greater assurance of insulation from minors.

Sable, 492 U.S. at 132 (Scalia, J., concurring).

The Commission identifies three compelling Government interests as justifying the regulation of broadcast indecency: support for parental supervision of children, a concern for children's well-being, and the protection of the home against intrusion by offensive broadcasts. Because we find the first two sufficient to support such regulation, we will not address the third.

Petitioners do not contest that the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves. Indeed, the Court has repeatedly emphasized the Government's fundamental interest in helping parents exercise their "primary responsibility for [their] children's well-being" with "laws designed to aid [in the] discharge of that responsibility." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). This interest includes "supporting parents' claim to authority in their own household" through "regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749 (internal quotation marks omitted).

Although petitioners disagree, we believe the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency. The Supreme Court has described that interest as follows:

> It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

New York v. Ferber, 458 U.S. 747, 756–57 (1982) (internal quotation marks and citations omitted); *see also Prince v.*

Massachusetts, 321 U.S. 158, 165 (1944) ("It is [in] the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed ... citizens.").

While conceding that the Government has an interest in the well-being of children, petitioners argue that because "no causal nexus has been established between broadcast indecency and any physical or psychological harm to minors," Joint Brief for Petitioners at 32, that interest is "too insubstantial to justify suppressing indecent material at times when parents are available to supervise their children." *Id.* at 33. That statement begs two questions: The first is how effective parental supervision can actually be expected to be even when parent and child are under the same roof; the second, whether the Government's interest in the well-being of our youth is limited to protecting them from clinically measurable injury.

As Action for Children's Television argued in an earlier FCC proceeding, "parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control" over what their children see on television. *In re Action for Children's Television*, 50 F.C.C.2d 17, 26 (1974). This observation finds confirmation from a recent poll conducted by Fairbank, Maslin, Maullin & Associates on behalf of Children Now. The survey found that 54 percent of the 750 children questioned had a television set in their own rooms and that 55 percent of them usually watched television alone or with friends, but not with their families. Sixty-six percent of them lived in a household with three or more television sets. *Compare 1989 NOI*, 4 F.C.C.R. at 8361 (63 percent of households own more than one television and 50 percent of teenagers have a television in own bedrooms). Studies described by the FCC in its 1989 Notice of Inquiry suggest that parents are able to exercise even less effective supervision over the radio programs to which their children listen. According to these studies, each American household had, on average, over five radios, and up to 80 percent of children had radios in their own bedrooms, depending on the

locality studied, *id.*; two-thirds of all children ages 6 to 12 owned their own radios, more than half of whom owned headphone radios. *Id.* at 8363. It would appear that Action for Children's Television had a firmer grasp of the limits of parental supervision 20 years ago than it does today.

With respect to the second question begged by petitioners, the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech. In *Ginsberg*, the Court considered a New York State statute forbidding the sale to minors under the age of 17 of literature displaying nudity even where such literature was "not obscene for adults...." 390 U.S. at 634. The Court observed that while it was "very doubtful" that the legislative finding that such literature impaired "the ethical and moral development of our youth" was based on "accepted scientific fact," a causal link between them "had not been disproved either." *Id.* at 641–42. The Court then stated that it "d[id] not demand of legislatures scientifically certain criteria of legislation. We therefore cannot say that [the statute] ... has no rational relation to the objective of safeguarding such minors from harm." *Id.* at 642–43 (internal quotation marks and citations omitted).

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986), the Court did not insist on a scientific demonstration of psychic injury when it found that there was a compelling governmental interest in protecting high school students from an indecent speech at a high school assembly. It noted that its prior cases "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* In *Bethel School District* and *Ginsberg*, of course, the protection of children did not require simultaneous restraints on the access of adults to indecent speech. The Court, however, has made it abundantly clear that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting. *Pacifica*, 438 U.S. at 749–50 ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*,

amply justify special treatment of indecent broadcasting."); *see also Sable*, 492 U.S. at 131 ("compelling interest [in] preventing minors from being exposed to indecent telephone messages").

Finally, we think it significant that the Supreme Court has recognized that the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would "impair[ ] [their] *ethical and moral* development." 390 U.S. at 641 (emphasis added). Furthermore, although the Court doubted that this legislative finding "expresse[d] an accepted scientific fact," *id.*, it concluded that the legislature could properly support the judgment of

> parents and others, teachers for example, who have [the] primary responsibility for children's well-being ... [by] ... assessing sex-related material harmful to minors according to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

Id. at 639 (internal quotation marks omitted).

The Court noted, in the context of obscenity, that

> [i]f we accept the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a ... legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior.... The sum of experience ... affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973). Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent expo-

sure to sexually explicit material just this side of legal obscenity. The Supreme Court has reminded us that society has an interest not only in the health of its youth, but also in its quality. *See Prince*, 321 U.S. at 168 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."). As Irving Kristol has observed, it follows "from the proposition that democracy is a form of self-government, ... that if you want it to be a meritorious polity, you have to care about what kind of people govern it." Irving Kristol, *On the Democratic Idea in America* 41–42, Harper & Row (1972).

We are not unaware that the vast majority of States impose restrictions on the access of minors to material that is not obscene by adult standards. *See 1989 NOI*, 4 F.C.C.R. at 8368–72. In light of Supreme Court precedent and the social consensus reflected in state laws, we conclude that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts. *See Sable*, 492 U.S. at 126 (Government's compelling interest in well-being of minors extends "to shielding [them] from the influence of literature that is not obscene by adult standards").

Petitioners argue, nevertheless, that the Government's interest in supporting parental supervision of children and its independent interest in shielding them from the influence of indecent broadcasts are in irreconcilable conflict. The basic premise of this argument appears to be that the latter interest potentially undermines the objective of facilitating parental supervision for those parents who wish their children to see or hear indecent material.

The Supreme Court has not followed this reasoning. Rather, it treats the Government interest in supporting parental authority and its "independent interest in the well-being of its youth," *Ginsberg*, 390 U.S. at 640, as complementary objectives mutually supporting limitations on children's access to material that is not obscene for adults. *Id.* at 639–40. And while it is true that the decision in *Ginsberg* "denie[d] to children free access to books ... to which many parents may wish their children to have uninhibited access," *id.* at 674 (Fortas, J., dissenting), as Justice Brennan pointed out in

writing for the majority, "the prohibition against sales to minors [did] not bar parents who so desire[d] from purchasing the [material] for their children." *Id.* at 639; *see also Pacifica*, 438 U.S. at 749–50; *id.* at 769–70 (Brennan, J., dissenting).

Today, of course, parents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes. Thus the goal of supporting "parents' claim to authority in their own household to direct the rearing of their children," *id.*, is fully consistent with the Government's own interest in shielding minors from being exposed to indecent speech by persons other than a parent. Society "may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat." *Pacifica*, 438 U.S. at 758 (Powell, J., concurring in part and concurring in the judgment).

The Government's dual interests in assisting parents and protecting minors necessarily extends beyond merely channeling broadcast indecency to those hours when parents can be at home to supervise what their children see and hear. It is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency.

2. Least restrictive means

The Government may

> regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.... [B]ut to withstand constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

Sable, 492 U.S. at 126 (internal quotation marks omitted). Petitioners argue that section 16(a) is not narrowly drawn to further the Government's interest in protecting children from broadcast indecency for two reasons: First, they assert that the class to be protected should be limited to children under the age of 12; and second, they contend that the "safe harbor" is not narrowly tailored because it fails to take proper account of the First Amendment rights of adults and because of the chilling effect of the 6:00 a.m. to midnight ban on the programs aired during the evening "prime time" hours. We address these arguments in turn.

a. Definition of "children"

Petitioners concede that it is appropriate to protect young children from exposure to indecent broadcasts. They remind us, however, that in *ACT I* we found it "troubling [that] the FCC ventures no explanation why it takes teens aged 12–17 to be the relevant age group for channeling purposes" in light of the fact that in an earlier legislative proposal, "the Commission would have required broadcasters to minimize the risk of exposing to indecent material children *under* age 12," 852 F.2d at 1341–42 (emphasis in original), and that in *ACT II* we directed the Commission on remand to address the question of the appropriate definition of "children." 932 F.2d at 1510.

Although, in *ACT II*, we made no mention of the fact, in its *1990 Report*, the FCC defined "children" to include "children ages 17 and under." 5 F.C.C.R. at 5301. The agency offered three reasons in support of its definition: Other federal statutes designed to protect children from indecent speech use the same standard (citing 47 U.S.C.A. § 223(b)(3) (Supp. II 1990) (forbidding indecent telephone communications to persons under 18)); most States have laws penalizing persons who disseminate sexually explicit materials to children ages 17 and under; and several Supreme Court decisions have sustained the constitutionality of statutes protecting children ages 17 and under (citing *Sable*, *Ginsberg*, and *Bethel School District*). *Id.*

We find these reasons persuasive and note, as the Commission did in the *1993 Report and Order* promulgating regulations pursuant to section 16(a), that the sponsor of that section, Senator Byrd, made specific reference to the FCC's finding that "there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day or night." 138 Cong. Rec. S7308 (1992) (statement of Sen. Byrd). In light of Supreme Court precedent and the broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials, the Commission was fully justified in concluding that the Government interest extends to minors of all ages.

b. The midnight to 6:00 a.m. "safe harbor"

Although, for the reasons set forth in Part II. B. below, we will require the Commission to allow the broadcast of indecent material between 10:00 p.m. and 6:00 a.m., we will address the propriety of section 16(a)'s midnight to 6:00 a.m. safe harbor. We do so for two reasons: First, in addressing the "narrowly tailored" issue, the parties have focused their arguments on the evidence offered by the Commission in support of the section's 6:00 a.m. to midnight ban on indecent programming. Second, the principles we bring to bear in our analysis of the midnight to 6:00 a.m. safe harbor apply with equal force to the more lenient one that the Commission must adopt as a result of today's opinion. Although fewer children will be protected by the expanded safe harbor, that fact will not affect its constitutionality. If the 6:00 a.m. to midnight ban on indecent programming is permissible to protect minors who listen to the radio or view television as late as midnight, the reduction of the ban by two hours will remain narrowly tailored to serve this more modest goal.

In *Pacifica*, the Supreme Court found that it was constitutionally permissible for the Government to place restrictions on the broadcast of indecent speech in order to protect the well-being of our youth. 438 U.S. at 749–51. We have since acknowledged that such restrictions may take the form of

channeling provided "that the Commission ... identify some reasonable period of time during which indecent material may be broadcast...." *ACT II*, 932 F.2d at 1509. The question, then, is what period will serve the compelling governmental interests without unduly infringing on the adult population's right to see and hear indecent material. We now review the Government's attempt to strike that balance.

The Supreme Court has stated that "a government body seeking to sustain a restriction on ... speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *see also Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (same). The data on broadcasting that the FCC has collected reveal that large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight. We find this information sufficient to support the safe harbor parameters that Congress has drawn.

The data collected by the FCC and republished in the Congressional Record for June 1, 1992, indicate that while 4.3 million, or approximately 21 percent, of "teenagers" (defined as children ages 12 to 17) watch broadcast television between 11:00 and 11:30 p.m., the number drops to 3.1 million (15.2 percent) between 11:30 p.m. and 1:00 a.m. and to less than 1 million (4.8 percent) between 1:45 and 2:00 a.m. 138 Cong. Rec. S7321. Comparable national averages are not available for children under 12, but the figures for particular major cities are instructive. In New York, for example, 6 percent of those aged 2 to 11 watch television between 11:00 and 11:30 p.m. on weekdays while the figures for Washington, D.C., and Los Angeles are 6 percent and 3 percent, respectively. *Id.* at S7322.

Concerning the morning portion of the broadcast restriction, the FCC has produced studies which suggest that significant numbers of children aged 2 through 17 watch

television in the early morning hours. In the case of Seattle, one of two medium-sized media markets surveyed, an average of 102,200 minors watched television between the hours of 6:00 a.m. and 8:00 a.m., Monday through Friday; in Salt Lake City, the average was 28,000 for the period from 6:00 a.m. to 10:00 a.m. *1993 Report and Order*, 8 F.C.C.R. at 708.

The statistical data on radio audiences also demonstrate that there is a reasonable risk that significant numbers of children would be exposed to indecent radio programs if they were broadcast in the hours immediately before midnight. According to the FCC, there is an average quarter-hour radio audience of 2.4 million teenagers, or 12 percent, between 6:00 a.m. and midnight. *Id.* Just over half that number, 1.4 million teenagers, listen to the radio during the quarter hour between midnight and 12:15 a.m. on an average night. *1990 Report*, 5 F.C.C.R. at 5302.

It is apparent, then, that of the approximately 20.2 million teenagers and 36.3 million children under 12 in the United States, *see 1989 NOI*, 4 F.C.C.R. at 8366, n.33; *Nielsen Television Index National TV Ratings February 24–March 1, 1992* 127, a significant percentage watch broadcast television or listen to radio from as early as 6:00 a.m. to as late as 11:30 p.m.; and in the case of teenagers, even later. We conclude that there is a reasonable risk that large numbers of children would be exposed to any indecent material broadcast between 6:00 a.m. and midnight.

Petitioners suggest that Congress should have used station-specific and program-specific data in assessing when children are at risk of being exposed to broadcast indecency. We question whether this would have aided the analysis. Children will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove. Furthermore, changes in the program menu make yesterday's findings irrelevant today. Finally, to borrow the Commission's phrase, such station- and program-specific data do not take "children's grazing" into account. As the Supreme Court observed in *Pacifica*, "[b]ecause the

broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 748. (In *Pacifica*, the objectionable broadcast was heard by a child in a car that was being driven by his father.) For this reason, we agree with the Commission that such data would not be "instructive." *1993 Report and Order*, 8 F.C.C.R. at 711.

The remaining question, then, is whether Congress, in enacting section 16(a), and the Commission, in promulgating the regulations, have taken into account the First Amendment rights of the very large numbers of adults who wish to view or listen to indecent broadcasts. We believe they have. The data indicate that significant numbers of adults view or listen to programs broadcast after midnight. Based on information provided by Nielsen indicating that television sets in 23 percent of American homes are in use at 1:00 a.m., the Commission calculated that between 21 and 53 million viewers were watching television at that time. *1989 NOI*, 4 F.C.C.R. at 8362; *see also id.* at 8381, 8393 (in Chicago, approximately 15 percent of adults watch broadcast television at midnight, and approximately 18 percent do so in Washington, D.C.). Comments submitted to the FCC by petitioners indicate that approximately 11.7 million adults listen to the radio between 10:00 p.m. and 11:00 p.m., while 7.4 million do so between midnight and 1:00 a.m. 1992 Comments at 8 n.3 (reprinted in Joint Appendix at 348). With an estimated 181 million adult listeners, this would indicate that approximately 6 percent of adults listen to the radio between 10:00 p.m. and 11:00 p.m. while 4 percent of them do so between midnight and 1:00 a.m. *Id.*

While the numbers of adults watching television and listening to radio after midnight are admittedly small, they are not insignificant. Furthermore, as we have noted above, adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors. We therefore believe that a midnight to 6:00 a.m. safe harbor takes adequate account of adults' First Amendment rights.

Petitioners argue, nevertheless, that delaying the safe harbor until midnight will have a chilling effect on the airing of programs during the evening "prime time" hours that are of special interest to adults. They cite, as examples, news and documentary programs and dramas that deal with such sensitive contemporary problems as sexual harassment and the AIDS epidemic and assert that a broadcaster might choose to refrain from presenting relevant material rather than risk the consequences of being charged with airing broadcast indecency. Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act. The enactment of section 16(a) does not add to such anxieties; to the contrary, the purpose of channeling, which we mandated in *ACT I* and reaffirmed in *ACT II*, 852 F.2d at 1343–44; 932 F.2d at 1509, and which Congress has now codified, is to provide a period in which radio and television stations may let down their hair without worrying whether they have stepped over any line other than that which separates protected speech from obscenity. Thus, section 16(a) has ameliorated rather than aggravated whatever chilling effect may be inherent in section 1464.

Petitioners also argue that section 16(a)'s midnight to 6:00 a.m. channeling provision is not narrowly tailored because, for example, Congress has failed to take into consideration the fact that it bans indecent broadcasts during school hours when children are presumably subject to strict adult supervision, thereby depriving adults from listening to such broadcasts during daytime hours when the risk of harm to minors is slight. The Government's concerns, of course, extend to children who are too young to attend school. *See Pacifica*, 438 U.S. at 749 ("broadcasting is uniquely accessible to children, even those too young to read"). But more to the point, even if such fine tuning were feasible, we do not believe that the First Amendment requires that degree of precision.

In this case, determining the parameters of a safe harbor involves a balancing of irreconcilable interests. It is, of course, the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the Constitu-

tion. Nevertheless, we believe that deciding where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts is the kind of judgment that is better left to Congress, so long as there is evidence to support the legislative judgment. Extending the safe harbor for broadcast indecency to an earlier hour involves "a difference only in degree, not a less restrictive alternative in kind." *Burson v. Freeman*, 112 S. Ct. 1848, 1857 (1992) (reducing campaign-free boundary around entrances to polling places from 100 feet to 25 feet is a difference in degree, not a less restrictive alternative in kind); *see also Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (if some limit on campaign contributions is necessary, court has no scalpel to probe whether $2,000 ceiling might not serve as well as $1,000). It follows, then, that in a case of this kind, which involves restrictions in degree, there may be a range of safe harbors, each of which will satisfy the "narrowly tailored" requirement of the First Amendment. We are dealing with questions of judgment; and here, we defer to Congress's determination of where to draw the line just as the Supreme Court did when it accepted Congress's judgment that $1,000 rather than some other figure was the appropriate limit to place on campaign contributions.

Recognizing the Government's compelling interest in protecting children from indecent broadcasts, Congress channeled indecent broadcasts to the hours between midnight and 6:00 a.m. in the hope of minimizing children's exposure to such material. Given the substantially smaller number of children in the audience after midnight, we find that section 16(a) reduces children's exposure to broadcast indecency to a significant degree. We also find that this restriction does not unnecessarily interfere with the ability of adults to watch or listen to such materials both because substantial numbers of them are active after midnight and because adults have so many alternative ways of satisfying their tastes at other times. Although the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young. We thus conclude that, standing alone,

the midnight to 6:00 a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth.

B. The Public Broadcaster Exception

Section 16(a) permits public stations that sign off the air at or before midnight to broadcast indecent material after 10:00 p.m. *See* 47 U.S.C. § 303 note. Petitioners argue that section 16(a) is unconstitutional because it allows the stations to present indecent material two hours earlier than all others.

Congress has provided no explanation for the special treatment accorded these stations other than the following: "In order to accommodate public television and radio stations that go off the air at or before 12 midnight, the FCC's enforcement authority would extend [to] the hour of 10 o'clock p.m. for those stations." 138 Cong. Rec. S7308 (statement of Sen. Byrd). The Commission has done little better. In its *1993 Report and Order*, the agency explained the preference as follows:

> In balancing the interests at stake, it appears reasonable to afford public broadcasters that do not operate during the regular safe harbor time period at least some opportunity to air indecent material as opposed to forcing them to extend their broadcast day beyond that which is economically feasible. Congress carved out this exception apparently as a kind of "rough accommodation" of its concerns for public broadcasters.

8 F.C.C.R. at 710. In its brief, the Commission justifies the disparate treatment accorded public and commercial broadcasters who sign off the air at midnight by suggesting that the latter may be able to finance the extension of their broadcasting day through the sale of advertising time. The agency also argues that allowing these public stations to begin broadcasting indecent material at 10:00 p.m. despite the significantly larger number of children in the radio and television audiences represents a reasonable trade-off because it serves the "substantial" (as opposed to "compelling") governmental interest in accommodating the free speech rights

of those stations. The Commission does not address the phenomenon of "children's grazing" that it used so effectively in arguing against the relevance of program-specific statistics.

Because Congress has made no suggestion that minors are less likely to be corrupted by sexually explicit material that is broadcast by a public as opposed to a commercial station, and because section 16(a) was adopted in reluctant response to our rejection of the earlier statute imposing a total ban on indecent broadcasts, we can only conclude that Congress created the exception as a result of a misunderstanding of our directive in *ACT II*. Our instruction that the Commission must "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired," 932 F.2d at 1509 (internal quotation marks omitted), did not require that every station be given some opportunity to broadcast indecent material. Rather, it was our expressed view that a clearly articulated channeling rule, as opposed to a case-by-case approach, was necessary to enable broadcasters to know when they might safely air indecent material. As the Supreme Court has observed, in this unique medium, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

Whatever Congress's reasons for creating it, the preferential safe harbor has the effect of undermining both the argument for prohibiting the broadcasting of indecent speech before that hour and the constitutional viability of the more restrictive safe harbor that appears to have been Congress's principal objective in enacting section 16(a). In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Supreme Court addressed a state sales tax that provided a tax exemption for religious, professional, trade, and sports journals, but not other magazines. The Court invalidated the selective application of the sales tax, in part because the articulated interest of encouraging "fledgling" publishers did not apply to struggling magazines other than those specified. *Id.* at 232. The Court found that even assuming there was a compelling interest in protecting such publishers, a selective exemption is not narrowly tailored to achieve that end. *Id.*;

accord Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 591–92 (1983) (state tax that exempted first $100,000 worth of ink and paper from state use tax unconstitutionally discriminated against small group of larger newspapers in violation of First Amendment).

Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), a municipal ordinance imposed a ban on newsracks dispensing commercial publications because they were unsightly but did not impose this ban on newsracks dispensing newspapers. The Court struck down the regulation, finding that the distinction between commercial and noncommercial newsracks bore "no relationship *whatsoever* to the particular interests that the city has asserted. It [was] therefore an impermissible means of responding to the city's admittedly legitimate interests." *Id.* at 1514 (emphasis in original).

Congress has failed to explain what, if any, relationship the disparate treatment accorded certain public stations bears to the compelling Government interest—or to any other legislative value—that Congress sought to advance when it enacted section 16(a). This is not a case like *Alliance for Community Media*, slip op. at 39–41, in which we allowed the FCC to require the segregation and blocking of indecent programs on leased-access channels while not imposing a similar restriction on public access channels. There, the Commission was able to justify the disparate treatment by carefully documenting the relationship between the regulation at issue and the problem to be solved, namely, the uninvited intrusion of indecent material into leased-access channel programming. Here, Congress and the Commission have backed away from the consequences of their own reasoning, leaving us with no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight.

C. Our Decisions in *ACT I* and *ACT II*

Petitioners maintain that our holdings in *ACT I* and *ACT II* preclude our finding that section 16(a) is narrowly

tailored to achieve the Government's compelling interest as defined by them. While we have addressed their principal arguments above—and have done so in a manner that we believe to be consistent with our holdings in those two cases—we point to certain essential differences between this case and those with which we dealt in *ACT I* and *ACT II*.

ACT I involved an assessment of the constitutionality of channeling decisions that had been made by the FCC on its own initiative; here we are dealing with an act of Congress which, as the Supreme Court has pointed out, enjoys a "presumption of constitutionality" that is not to be equated with "the presumption of regularity afforded an agency in fulfilling its statutory mandate." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983). It is true, of course, that in *ACT II* we vacated a total ban on indecent broadcasts that Congress had attached to an appropriations bill. In doing so, we stated that our holding in *ACT I*

> necessarily means that the Commission may not ban such broadcasts entirely. The fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that, under *ACT I*, such a prohibition cannot withstand constitutional scrutiny.

932 F.2d at 1509. Having declared Congress's 24-hour ban unconstitutional because of its totality, we remanded the case to the Commission with instructions to redetermine,

> after a full and fair hearing, the times at which indecent material may be broadcast, to carefully review and address the specific concerns we raised in *ACT I:* among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts.

Id. at 1510 (internal quotation marks and ellipsis omitted). In doing so, we made no mention of the fact that subsequent

to our decision in *ACT I*, the Commission had accumulated substantial information and comments relating to the banning of indecent broadcasts and had stated its reasons for defining "children" to include those aged 12 to 17. *ACT II*, therefore, cannot be seen as a rejection of the sufficiency of either.

While our holdings in this case are generally consistent with those in our two earlier decisions, we acknowledge that there are significant differences in our approach to certain of the issues. To the degree that the analyses in those earlier cases disagree with that contained in today's decision, they are, of course, superseded.

III. Conclusion

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Constitution, however, permits restrictions on speech where necessary in order to serve a compelling public interest, provided that they are narrowly tailored. We hold that section 16(a) serves such an interest. But because Congress imposed different restrictions on each of two categories of broadcasters while failing to explain how this disparate treatment advanced its goal of protecting young minds from the corrupting influences of indecent speech, we must set aside the more restrictive one. Accordingly, we remand this case to the Federal Communications Commission with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m.

It is so ordered.

EDWARDS, *Chief Judge*, dissenting: In this case, the majority upholds as constitutional a *total ban* of "indecent" speech on *broadcast* television and radio between the hours of 6 a.m. and midnight.[1] The majority readily acknowledges that *inde-*

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[1] At issue is the Public Telecommunications Act of 1992, Pub. L. No. 102–356, § 16(a), 106 Stat. 949, 954 (1992) ("section 16(a)"). Section 16(a) of Act provides:

> FCC Regulations—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).
>
> The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act [Aug. 26, 1992].

47 U.S.C. § 303 note (Supp. IV 1992).

Section 16(a) was enforced by the Federal Communications Commission in 1993. *In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464: Report and Order*, 8 F.C.C.R. 704, 711 (1993) ("*Enforcement Order*").

Although the majority finds the 6 a.m. to midnight ban is narrowly tailored to serve a compelling state interest, it holds that section 16(a) is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10 p.m. and midnight. The majority reaches this conclusion because "Congress has failed to explain what, if any, relationship the disparate treatment accorded certain public stations bears to the compelling Government interest—or to any legislative value—that Congress sought to advance when it enacted section 16(a)."

The "public broadcaster exception" is an aside to the real issue in this case. Indeed, in holding that the 6 a.m. to midnight ban is constitutional, the majority appears to invite Congress to extend the 6 a.m. to midnight ban to all broadcasters, without exception. Therefore, in my view, the majority's treatment of this issue in no way deflects from its principal holding that "the midnight to 6:00

cent speech (as distinguished from *obscene* speech) is fully protected by the Constitution, and that the Government may not regulate such speech based on its content except when it chooses the least restrictive means to effectively promote an articulated compelling interest. In this case, the Government fails to satisfy the acknowledged constitutional strictures.

The Government advances three goals in support of the statute: first, it claims that the statute facilitates parental supervision of the programming their children watch and hear; second, it claims that the ban promotes the well-being of minors by protecting them from indecent programming assumed to be harmful; and, finally, it contends that the ban preserves the privacy of the home. *Enforcement Order*, 8 F.C.C.R. at 705–06. The majority finds the first two interests compelling, and so finds it unnecessary to address the third. I, too, will focus on the first two interests, which I find to be unsupported.

As an initial matter, I do not comprehend how the two interests can stand *together*. "Congress may properly pass a law to facilitate *parental supervision of their children, i.e.*, a law that simply segregates and blocks indecent programming and thereby helps parents control whether and to what extent their children are exposed to such programming. However, a law that effectively *bans* all indecent programming—as does the statute at issue in this case—does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my ... television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming." *Alliance for Community Media v. FCC*, Nos. 93–1169, *et al.*, slip op. at 1 (D.C. Cir. June 6, 1995) (Edwards, C.J., dissenting).

Furthermore, the two interests—facilitating parental supervision and protecting children from indecent material—

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a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth." It is this holding that will be the focus of this dissent.

fare no better if considered alone. With respect to the alleged interest in protecting children, although the majority strains mightily to rest its finding of harm on intuitive notions of morality and decency (notions with which I have great sympathy), the simple truth is that "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." *Id.* There *is* significant evidence suggesting a causal connection between viewing *violence* on television and antisocial violent behavior;[2] but, as was conceded by Government counsel at oral argument in this case, the FCC has pointed to no such evidence addressing the effects of *indecent* programming. With respect to the interest in facilitating parental supervision, the statute is not tailored to aid parents' control over what their children watch and hear; it does not, for example, "segregate" indecent programming on special channels, as was the case in *Alliance for Community Media*,[3] nor does it promote a blocking device which individuals control. Rather, section 16(a) involves a *total ban* of disfavored programming during hours when adult viewers are most likely to be in the audience.

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[2] *See, e.g.*, ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS 72–76 (1973); WILLIAM A. BELSON, TELEVISION VIOLENCE AND THE ADOLESCENT BOY (1978); GEORGE COMSTOCK, THE EVOLUTION OF AMERICAN TELEVISION 159–238 (1989); MONROE M. LEFKOWITZ ET AL., GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION (1977); L. Rowell Huesmann et al., *The Effects of Television Violence on Aggression: A Reply to a Skeptic*, *in* PSYCHOLOGY AND SOCIAL POLICY 191 (Peter Suedfeld & Philip E. Tetlock eds., 1992); David Pearl, *Familial, Peer, and Television Influences on Aggressive and Violent Behavior*, *in* CHILDHOOD AGGRESSION AND VIOLENCE: SOURCES OF INFLUENCE, PREVENTION, AND CONTROL 231, 236–37 (David H. Crowell et al. eds., 1987).

[3] *Alliance for Community Media* involved the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, § 10, 106 Stat. 1460, 1468 (1992) and *In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 F.C.C.R. 2638 (1993), which included a segregate-and-block scheme.

Because the statutory ban imposed by section 16(a) is not the least restrictive means to further compelling state interests, the majority decision must rest primarily on a perceived distinction between the First Amendment rights of *broadcast media* and *cable (and all other non-broadcast) media*. The majority appears to recognize that section 16(a) could not withstand constitutional scrutiny if applied against *cable* television operators; nonetheless, the majority finds this irrelevant because it believes that "there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment." This is the heart of the case, plain and simple.

Respectfully, I find the majority's position flawed. First, because I believe it is no longer responsible for courts to provide lesser First Amendment protection to broadcasting based on its alleged "unique attributes," I would scrutinize section 16(a) in the same manner that courts scrutinize speech restrictions of cable media.

Second, I find it incomprehensible that the majority can so easily reject the "public broadcaster exception" to section 16(a), *see* note 1 *supra*, and yet be blind to the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators. No one disputes that cable exhibits more and worse indecency than does broadcast. And cable television is certainly pervasive in our country. Today, a majority of television households have cable,[4] and over the last two decades, the percentage of television households with

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[4] Approximately 59 million households have cable television. RESEARCH & POLICY ANALYSIS DEPARTMENT, NATIONAL CABLE TELEVISION ASSOCIATION, CABLE TELEVISION DEVELOPMENTS: INDUSTRY OVERVIEW, Fall 1994, at 1–A (citing A.C. Nielsen Co. & Paul Kagan Associates, Inc., *Marketing New Media*, June 20, 1994); *see also Alliance for Community Media*, Nos. 93–1169, *et al.*, slip op. at 33–34 (citing H.R. CONF. REP. No. 862, 102d Cong., 2d Sess. 56 (1992) (noting that more than sixty percent of all households with television, subscribe to cable)); *id.* (citing S. REP. No. 92, 102d Cong., 2d Sess. 3 (1991) (noting that "[c]able television has become our Nation's dominant video distribution medium")).

cable has increased every year.[5] However, the Government does not even attempt to regulate cable with the same heavy regulatory hand it applies to the broadcast media. There is no ban between 6 a.m. and midnight imposed on cable. Rather, the Government relies on viewer subscription and individual discretion instead of regulating commercial cable. Viewers may receive commercial cable, with all of its indecent material, to be seen by adults and children at any time, subject only to the viewing discretion of the cable subscriber. "Furthermore, many subscribers purchase cable service to get improved [broadcast] television reception, and a number of basic cable subscriptions are packaged to include channels that offer some indecent programming; so these subscribers will get indecent programming whether they want it or not." *Id.*, slip op. at 7 (Edwards, C.J., dissenting). In other words, the Government assumes that this scheme, which relies on personal subscription and individual discretion, fosters parental choice and protects children without unduly infringing on the free speech rights of cable operators and the adult audience.

If exposure to "indecency" really is harmful to children, then one wonders how to explain congressional schemes that impose iron-clad bans of indecency on *broadcasters*, while simultaneously allowing a virtual free hand for the real culprits—*cable operators*. And the greatest irony of all is that the majority holds that section 16(a) is constitutional in part because, in allowing parents to subscribe to cable television as they see fit, Congress has facilitated parental supervision of children. In other words, Congress may ban indecency on broadcast television because parents can easily purchase all the smut they please on cable! I find this rationale perplexing.

At bottom, I dissent for three reasons: First, the Government's asserted interests in facilitating parental supervision

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[5] In 1975, the percentage of television households with cable was 13%; in 1985, the percentage was 45%; and in 1994, estimations suggest between 62% and 63% of television households have cable. NATIONAL CABLE TELEVISION ASSOCIATION, at 1–A, 2–A.

and protecting children from indecency are irreconcilably in conflict in this case. Second, the Commission offers no evidence that indecent broadcasting harms children. And although it is an easy assumption to make—that indecent broadcasting is harmful to minors—Supreme Court doctrine suggests that the Government must provide some evidence of harm before enacting speech-restrictive regulations. Finally, the Government has made no attempt to search out the least speech-restrictive means to promote the interests that have been asserted. For these reasons, section 16(a) should be struck down as unconstitutional.

I. First Amendment Protections for the Broadcast Media

Over the years, Congress and the Commission have regulated the broadcast media more heavily than they have regulated the non-broadcast media. And courts have upheld speech-restrictive regulations imposed on broadcast which undoubtedly would have been struck down were they imposed on other media. *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994) ("*TBS*") ("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media.")[6]; *FCC v. League of Women Voters of California*, 468 U.S. 364, 376 (1984) ("Were a similar ban ... applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment."). The Supreme Court has explained its tendency to uphold speech-restrictive regulations of broadcast as providing the broadcast media with limited First Amendment protection. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (plurality opinion) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

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[6] "Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (television), and *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (radio), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (print), and *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988) (personal solicitation)." *TBS*, 114 S. Ct. at 2456 (parallel citations omitted).

The absurdity of this bifurcated approach—applying a relaxed level of scrutiny to content-based regulations of broadcast and a strict level of scrutiny for content-based regulations of non-broadcast media—is most apparent in a comparison of the Supreme Court's analysis of broadcast and cable. In *Pacifica*, a plurality of the Court applied a reduced level of scrutiny in determining the First Amendment rights of a broadcasting station. 438 U.S. at 748–50. Last year, however, a majority of the Court held that cable television is entitled to the same First Amendment protection as all other non-broadcast media. *TBS*, 114 S. Ct. at 2456–57. There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of *Pacifica* when it was issued almost 20 years ago, it makes no sense now.[7]

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[7] In beginning their analysis of content-based regulations of broadcast, Court opinions often cite to the now-familiar quotation from *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952): "Each method [of expression] tends to present its own peculiar problems." *See, e.g. Pacifica*, 438 U.S. at 748; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 386–87 (1969); *League of Women Voters*, 468 U.S. at 377. In fact, these opinions seem to attribute more to the Court's statement in *Joseph Burstyn* than appears warranted. *Compare Joseph Burstyn*, 343 U.S. at 503 ("Each method tends to present its own peculiar problems.") *with Pacifica*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems." (citing *Joseph Burstyn*, 343 U.S. at 502–03)) *and Red Lion*, 395 U.S. at 386–87 ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." (citing *Joseph Burstyn*, 343 U.S. at 503)).

More glaringly, these opinions fail to quote the sentence that follows. In *Joseph Burstyn*, the Supreme Court struck down a law which forbade the showing of any motion-picture film without a license, that could be withheld if a censor found the film sacrilegious. In determining that motion pictures were within the protection of the First Amendment, the Court stated: "*Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary.*" 343 U.S. at 503 (emphasis added). Certainly with respect to broadcast and cable, the peculiar problems or

The justification for the Supreme Court's distinct First Amendment approach to broadcast originally centered on the notion of spectrum scarcity. The electromagnetic spectrum was physically limited—there were more would-be broadcasters than frequencies available and broadcasters wishing to broadcast on the same frequency may have interfered with each other—and required regulation to assign frequencies to broadcasters. *See TBS*, 114 S. Ct. at 2456. The Court reasoned that the Government could impose limited content restraints and certain affirmative obligations on broadcasters on account of spectrum scarcity. *See id.* at 2457 (citing *Red Lion*, 395 U.S. at 390). In 1978, the Court provided two additional rationales—broadcast was uniquely intrusive into the privacy of the home and uniquely accessible to children—which justified relaxed scrutiny and thereby reduced the First Amendment protection accorded to broadcasters. *See Pacifica*, 438 U.S. at 748–49. These justifications—spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast.

A. Spectrum Scarcity

In 1943, the Court determined that the "unique characteristic" of broadcast—that "[u]nlike other modes of expression, radio inherently is not available to all"—explained "why, unlike other modes of expression, it is subject to governmental regulation." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 226 (1943) ("*NBC*"). Twenty-six years later, the Court spun out the First Amendment implications of this burgeoning scarcity theory. *Red Lion*, 395 U.S. at 388–90. The Court first offered an economic scarcity theory,[8]

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differences between the two media do not justify different levels of First Amendment protection.

[8] Interestingly, in responding to Government's argument that cable and broadcast are alike in that they both are beset by "market dysfunction," the *TBS* Court stated that "the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our

finding that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[9] *Id.* at 388. The Court also offered a technological scarcity theory: recognizing the need to prevent "overcrowd[ing of] the spectrum,"[10] *id.* at 389, the Court held that, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium,"[11] *id.* at 390.

Although the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only grudgingly upheld the

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broadcast jurisprudence." 114 S. Ct. at 2457 (citations omitted). Apparently, the Court is now prepared to abandon the *economic* scarcity theory.

[9] The scarcity theory justifying regulation of broadcast was hinged in part on a public trust notion: "those who are granted a license to broadcast must serve in a sense as fiduciaries for the public." *League of Women Voters*, 468 U.S. at 377.

[10] The Court recently restated this concern: "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all." *TBS*, 114 S. Ct. at 2456 (citing *NBC*, 319 U.S. at 212).

[11] *See also TBS*, 114 S. Ct. 2457 (noting that spectrum scarcity "has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees" (citing *Red Lion*, 395 U.S. at 390)); *League of Women Voters*, 468 U.S. at 377 ("The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.'" (quoting *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973))).

distinction. *See, e.g., TBS*, 114 S. Ct. at 2456–57. On a few occasions, the Supreme Court has acknowledged the mounting criticism against its scarcity rationale. *See id.* at 2457 (noting, that "courts and commentators have criticized the scarcity rationale since its inception");[12] *League of Women Voters*, 468 U.S. at 376–77 n.11.[13] Nevertheless, to date, the Court has declined to revisit the validity of the scarcity rationale. *See TBS*, 114 S. Ct. at 2457 ("[W]e have declined to question its continuing validity as support for our broadcast jurisprudence ... and see no reason to do so here."); *League of Women Voters*, 468 U.S. at 377 n.11 ("We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.").[14]

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[12] In *TBS*, 114 S. Ct. at 2457 n.5, the Court cited some of those courts and commentators: *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508–09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); LEE BOLLINGER, IMAGES OF A FREE PRESS 87–90 (1991); LUCAS POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197–209 (1987); MATTHEW SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 7–18 (1986); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12–27 (1959); Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 218–40 (1987); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1072–74 (1994).

[13] The *League of Women Voters* Court noted that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years," and that "[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete." 468 U.S. at 376–77 n.11 (citing Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221–26 (1982)).

[14] In 1987, the Commission explicitly provided that "signal" to the Supreme Court in holding that, "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the

In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale.

For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a "unique characteristic" that should make any difference in terms of First Amendment protection.[15] First, in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting from print[16] and is easily remedied with a system of administrative licensing or private property rights.[17] Another problem alluded to by the Court in *Red Lion* is the claim that the spectrum is inherently limited, in contrast to cable stations or newsprint. Today, however, the nation enjoys a proliferation of broadcast stations,[18] and should the country decide to increase the number

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electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5053 (1987); *see also* Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U.L. REV. 990, 1011 (1989).

[15] For a particularly thorough rejection of various scarcity arguments, see Spitzer, *supra*, at 1013–20, and notes 12–14 *supra*.

[16] *See* Spitzer, *supra*, at 1013–15.

[17] Coase demonstrated that one can efficiently distribute rights to scarce resources through a market system. *See* Coase, *supra*, at 12–27.

[18] This court has found that "[b]roadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Co.* ... and it appears that currently 'the number of broadcast stations ... rivals and perhaps surpasses the number of newspapers and magazines in which political messages

of channels, it need only devote more resources toward the development of the electromagnetic spectrum.[19]

In response to the economic scarcity argument—that there are more would-be broadcasters than spectrum frequencies available—economists argue that all resources are scarce in the sense that people often would like to use more than exists.[20] Especially when the Government gives away a valuable commodity, such as the right to use certain airwaves free of charge, the demand will likely always exceed the

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may effectively be carried.'" *Telecommunications Research & Action Ctr.*, 801 F.2d at 508–09 n.4 (quoting *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983)). This court went on to note, "[i]ndeed, many markets have a far greater number of broadcasting stations than newspapers." *Id.*; *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 54 (1993) (noting that most cities have far more television and radio stations than major newspapers).

[19] *See* Spitzer, *supra*, at 1015; *cf.* Fowler & Brenner, *supra*, at 222–23 (suggesting that additional channels can be added without increasing portion reserved for broadcast by decreasing bandwidth of each channel and claiming that advertising dollars restrict broadcast opportunities more than number of channels).

[20] Judge Bork's opinion *Telecommunications Research & Action Ctr.* sums up this point:

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.

801 F.2d at 508 (footnotes omitted).

supply.[21] And with the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity argument superfluous.

In short, neither technological nor economic scarcity distinguish broadcast from other media. And while some may argue that spectrum scarcity may justify a system of administrative regulation as opposed to a free market approach to stations,[22] the theory does not justify reduced First Amendment protection.

B. Accessibility to Children and Pervasiveness

The two additional rationales offered by the plurality opinion in *Pacifica*, attempting to distinguish broadcasting from other media, also fail to justify limited First Amendment protection of broadcast. The plurality found that "broadcasting is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749.[23] This characteristic, however, fails to distinguish broadcast from cable; and, notably, the rationale is absent from the Court's *TBS* opinion.

The plurality in *Pacifica* added another rationale which really has two components. The opinion reasoned that "the

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[21] Spitzer suggests that if one were to give paper away for free, the demand would certainly exceed the supply. *See* Spitzer, *supra*, at 1016.

[22] Coase presents a compelling argument for a free market system, in which we would treat broadcast rights as private property to avoid the chaos of the 1920s: after an initial allocation, ownership and use could be governed by the free market. *See* Coase, *supra*, at 12–27.

[23] In *Joseph Burstyn*, the Court faced a similar argument, "that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." 343 U.S. at 502. The Court responded that, "[e]ven if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here." *Id.*

broadcast media have established a uniquely pervasive presence in the lives of all Americans.... [The] material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."[24] *Id.* at 748. Again, the pervasiveness of its programming hardly distinguishes broadcast from cable. As noted above, cable is pervasive: a majority of television households have cable today, and this percentage has increased every year over the last two decades. *See* NATIONAL CABLE TELEVISION ASSOCIATION, *supra*, at 1–A, 2–A. The intrusiveness rationale, that the material confronts the citizen in the privacy of his or her home, likewise, does not distinguish broadcast from cable, nor account for the divergent First Amendment treatment of the two media. Finally, in light of *TBS*, in which the Court omitted any discussion of these rationales, the *Pacifica* rationales no longer can be seen to serve as justifications for reduced First Amendment protection afforded to broadcast.

It is relevant that *Pacifica* was a plurality opinion which provided a very limited holding. *See* 438 U.S. at 750 ("It is appropriate ... to emphasize the narrowness of our holding.... The Commission's decision rested entirely on a nuisance rationale under which context is all-important."). The Court has subsequently emphasized that *Pacifica*'s holding was "emphatically narrow," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989), essentially confirming that *Pacifica* never was seen to be a seminal statement of constitutional law. But beyond the narrowness of the Court's decision, it seems clear now that *Pacifica* is a flawed decision, at least when one considers it in light of enlightened

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[24] The plurality opinion added:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

Pacifica, 438 U.S. at 748–49. This elaboration on the intrusiveness rationale, of course, does not distinguish broadcast from cable.

economic theory, technological advancements, and subsequent case law. The critical underpinnings of the decision are no longer present. Thus, there is no reason to uphold a distinction between broadcast and cable media pursuant to a bifurcated First Amendment analysis.[25]

II. Full First Amendment Protection of Broadcast

Because no reasonable basis can be found to distinguish broadcast from cable in terms of the First Amendment protection the two media should receive, I would review section 16(a) and the *Enforcement Order* under the stricter level of scrutiny courts apply to content-based regulations of cable. This means "the most exacting scrutiny" should be applied "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *TBS*, 114 S. Ct. at 2459.[26] In *Sable*, the Court indicated that the "exacting scrutiny" test has two prongs: the Government's interests must be "compelling," and the method of regulation chosen must be "the least restrictive means" to achieve those compelling interests. 492 U.S. at 126. That is the essence of the test, I think.

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[25] Zechariah Chafee provides a historical view of the Court's wavering toleration of speech-restrictive regulations on different media:

> Newspapers, books, pamphlets, and large meetings were for many centuries the only means of public discussion, so that the need for their protection has long been generally realized. On the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture, and the radio.

Zechariah Chafee, Free Speech in the United States 381 (1942).

[26] The Justices voted 8–1 on this issue, although a majority of the Court found that the regulations were content neutral and applied intermediate scrutiny on this basis. *See TBS*, 114 S. Ct. at 2469.

In this case, the majority views the broadcast media as disfavored in the application of First Amendment rights, relying principally on *Pacifica*; however, my colleagues nonetheless agree that section 16(a) reflects a content-based regulation that is subject to exacting scrutiny. Indeed, even the FCC viewed the case in this way. In my view, there is no way that section 16(a) can survive exacting scrutiny.

A. Content-Based Regulations

In explaining the reasons for applying heightened or exacting scrutiny, the Supreme Court recently stated:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.

TBS, 114 S. Ct. at 2458. This fundamental principle means that "the First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals." *Id.*[27] Because section 16(a) and the *Enforcement Order* ban indecent expression,[28] they constitute content-based regulations, which have traditionally raised the red flag of exacting scrutiny. As the Court stated in *Sable*, "[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 492 U.S. at 126. At issue in this case is whether the Government's interests are indeed compelling and whether it has chosen the least restrictive means to further its asserted compelling interests.

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[27] An earlier Court phrased this notion as: "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

[28] Section 16(a) applies to "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Enforcement Order*, 8 F.C.C.R. at 705 n.10.

To withstand constitutional scrutiny, the Government's regulations must serve its interests " 'without unnecessarily interfering with First Amendment freedoms.' " *Id.* at 126 (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980)). The First Amendment rights at stake here are those of broadcasters and the adult broadcasting audience. The Supreme Court finds laws insufficiently tailored when they deny adults their free speech rights by allowing them to read, watch, or hear only what was acceptable for children. *See, e.g., Butler v. Michigan*, 352 U.S. 380, 383 (1957); *Sable*, 492 U.S. at 127 (finding that "this case, like *Butler*, presents [the Court] with 'legislation not reasonably restricted to the evil with which it is said to deal' ") (quoting *Butler*, 352 U.S. at 383).

When First Amendment rights are at stake, appellate courts cannot defer to a legislative finding, but must make an independent inquiry to assess whether the record supports the Government's interests. *Sable*, 492 U.S. at 129; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (assessing legislative finding or "declaration" that clear and present danger existed). The Court has found this "particularly true where the Legislature has concluded that its product does not violate the First Amendment." *Sable*, 492 U.S. at 129.

B. Compelling Interests

The FCC claims that section 16(a) serves three compelling governmental interests. The ban is meant, first, to support parental supervision of children; second, to promote the well-being of minors; and third, to preserve the privacy of the home. *Enforcement Order*, 8 F.C.C.R. at 705–06. Only the first two interests are at issue.

With respect to the interest in facilitating parental supervision, the Supreme Court has stated that the law has "consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). It is entirely reasonable for "[t]he legislature [to] properly conclude that parents and others . . .

who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* Similarly, with respect to the Commission's second interest, protecting the well-being of its youth, the Court on numerous occasions has found "a compelling interest in protecting the physical and psychological well-being of minors." *Sable*, 492 U.S. at 126; *see also Pacifica*, 438 U.S. at 749; *Ginsberg*, 390 U.S. at 640. But to note that these interests are compelling in the abstract is not to scrutinize the Government's assertions as applied to this case.

As I discussed in the panel decision, *Action for Children's Television v. FCC*, 11 F.3d 170, 183–86 (D.C. Cir. 1993) (Edwards, J., concurring), one of the most significant problems with the Government's defense of its regulations is that its first two asserted interests, at least as the FCC appears to define their scope here, are irreconcilably in conflict. The Commission cannot simultaneously seek to facilitate parental supervision over their children's exposure to indecent programming and at the same time protect all children from indecent speech by imposing a flat ban on indecent programming from the hours of 6 a.m. to midnight. Simply put, among the myriad of American parents, not every parent will decide, as the Commission has, that the best way to raise its child is to have the Government shield children under eighteen from indecent broadcasts. Furthermore, not every parent will agree with the Commission's definition of indecency, nor whether it is appropriate in some contexts, nor at what age their own children may be exposed to such programming. In asserting both interests—facilitating parental supervision and protecting children from indecent broadcast—the Government must assume not only that parents agree with the Commission, but that parents supervise their children in some uniform manner. Surely, this is not the case. When acting consciously, some parents may prohibit their children from any exposure to indecent material; some may impose a modified prohibition depending upon the content of the programming and the child's maturity; still others may view or listen to indecent material with their children, either to criticize, endorse, or remain neutral about what they see or

hear. A complete ban on indecent broadcasts does not facilitate the variety of American parents in supervising their children's exposure to broadcasting.

The Commission maintains that these two interests bolster and reinforce each other. Tr. of Oral Argument at 56. It contends that "it simply is not practical for these parents to control effectively what their children might see and hear on the broadcast medium." Brief for Respondents at 16. But here, the Commission assumes that parents are unavailable or inept at the task of parenting, and essentially establishes itself as the final arbiter of what broadcast American children may see and hear. In so doing, the Government tramples heedlessly on parents' rights to rear their children as they see fit and to inculcate them with their own moral values.[29] Courts generally do not take these moves lightly. We have long recognized the rights of parents to raise their children in the manner they see fit. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (striking state law requiring children to attend public schools as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking state law that prohibited teaching foreign languages to children as interfering with "the power of parents to control the education of their own"). As the Supreme Court said in *Ginsberg*, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." 390 U.S. at 639; *see also Wisconsin v. Yoder*, 406 U.S. 205, 213–36 (1972) (exempting children of Amish faith from compulsory

[29] At one point in its brief, the Commission attempts to narrow its interest in facilitating parents by claiming that it "aids parents who choose not to expose their children to indecent material." Brief for Respondents at 16 (citing *Enforcement Order*, 8 F.C.C.R. at 710). This does not absolve the Government from trampling on the rights of parents. The only difference, is that in so phrasing its interest, the Commission only clarifies the parents on whom it tramples: those parents who do not agree with the Commission about how best to raise their children.

school attendance law on grounds that it impinges on other fundamental rights such as traditional interest of parents with respect to religious upbringing of their children). When the Government does intervene in the rearing of children contrary to parents' preferences, it is usually in response to some significant breakdown within the family unit or in the complete absence of parental caretaking. Society protects children who are abused, neglected, or abandoned, because the harm is clear and such actions are contrary to civilized notions of parenting. The Government does not generally tell parents what speech their children should and should not hear *absent some showing of harm to their children.*

In other contexts, these two interests—facilitating parental supervision and protecting children from indecency—may have worked in tandem. For example, in *Pacifica*, a father's complaint that his son heard an indecent monologue prompted the FCC to enforce sanctions. *Pacifica*, 438 U.S. at 729–33. In that case, facilitating parental control and protecting the well-being of minors might have simultaneously converged; the parent agreed with the Commission (or vice versa). In *Ginsberg*, the statute only prohibited selling obscene magazines to minors; it did not prohibit the selling of obscene magazines to everyone. 390 U.S. 634–35. Again, this statute may be viewed as facilitating parental control while simultaneously protecting children from indecency. Indeed, the Court explicitly recognized that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id.* at 639 (citing Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COL. L. REV. 391, 413 n.68 (1963) (noting that "one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit")). The instant case, however, differs from those two; this ban removes indecent speech from the broadcast airwaves beyond the reach of adults and parents, essentially mandating the Commission's desired result. Once it becomes clear that, in this context, these two interests conflict, it is then important to determine which compelling interest takes precedence.

The FCC asserts that its primary interest is in facilitating parental supervision. *See* Tr. of Oral Argument at 55 (counsel for FCC stating "[w]e consistently stated that the primary interest is in aiding parents in supervising children"). The Commission is wise to assert its interest in facilitating parents as its primary interest, for this surely offers a firmer base for permissible regulation. As the Supreme Court stated in *Ginsberg*,

> [i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

390 U.S. at 639 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

However, if facilitating parental supervision means allowing parents to run the household in the manner they choose, then the FCC has preempted, not facilitated, parental control in enforcing section 16(a). While the Government's interest in protecting the well-being of children is undoubtedly compelling, when it conflicts with parental preferences and arguably treads on First Amendment rights, case law requires the Government to show some evidence of harm. It is easy to assume that there must be ill effects from exposing children, and especially young ones, to indecent material, but Supreme Court doctrine suggests that we must check our assumptions. And with respect to exposure to broadcast indecency and the impact on children, we have yet to unearth any ill effects.

The Supreme Court has not established what is required in terms of a showing of harm from exposure to indecency. Although harm was not at issue in *Pacifica*, one can read the plurality opinion there as assuming that the indecent monologue harmed children. Recent Supreme Court case law, however, suggests that more is required. In *TBS*, a plurality of the Court found that, while "the Government's asserted interests are important in the abstract," this did not mean that the regulations at issue in that case "in fact advance those interests." 114 S. Ct. at 2470. It continued, "[w]hen the Government defends a regulation on speech as a means to

. . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Id.* (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). The Court was clear about the burdens on the Government: "It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1798–99 (1993)); *see also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("[T]his Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.'" (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22 (1984))); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (internal quotations omitted)). While the Court in *TBS* noted that Congress's predictive judgments are entitled to substantial deference, and that Congress is not required to make a record of the type an agency must make, it stressed that Congress's judgments are not insulated from "meaningful judicial review." 114 S. Ct. at 2471 (plurality). "On the contrary," the Court stated "we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" *Id.* (quoting *Sable*, 492 U.S. at 129).

In *Edenfield*, the Court struck down a state law prohibiting certified public accountants ("CPAs") from engaging in direct, in-person, uninvited solicitation. 113 S. Ct. 1798–1804. The Court held that, under the intermediate scrutiny prescribed for commercial speech under its decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), a party seeking to uphold a restriction on speech carries the burden of justifying it which "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its

restriction will in fact alleviate them to a material degree." *Edenfield*, 113 S. Ct. at 1800; *see also League of Women Voters*, 468 U.S. at 391 (finding that interest asserted by Government is not substantially advanced by statutory scheme, in part because risk that Government would seek to influence or pressure local stations was "speculative at best"). In *Edenfield*, the Court found that the state Board of Accountancy failed to present any studies that suggested that personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence, the prevention of which the Board claimed as its interest. 113 S. Ct. at 1800. The Court noted that the only suggestion that the prevention of these evils was served by the ban was found in an affidavit containing conclusory statements. *Id.* at 1801. The evidence offered by the Commission in this case is no better.[30]

In contending that the Government must protect children's well being, the Commission makes two arguments: first, it asserts that it may assume that indecent broadcast material harms children as a matter of law, citing *Pacifica* and *Ginsberg*; and, second, it suggests that the congressional sponsors considered evidence of the negative effects of television on young viewers. *Enforcement Order*, 8 F.C.C.R. at 706–07. The Commission's reliance on *Pacifica* does not help its case; the question of harm was not before that Court, and, as discussed earlier, the interest in the protection of children was not necessarily at odds with the interest in facilitating parental supervision in that case. Contrary to the Commission's assertion, the Court in *Ginsberg* did not presume harm as a matter of law. Rather, the Court struggled with the question of whether the legislature had shown evidence of a causal link between "obscenity" and "impairing the ethical

[30] Were I hesitant that the *Edenfield* requirement to put forth some evidence of harm remained only in the commercial speech context, the Court's *TBS* and *League of Women Voters* opinions assures me that *Edenfield*'s requirements apply more broadly. In addition, it makes sense that whatever proof is required to pass intermediate scrutiny would also be required for exacting scrutiny.

and moral development" of youth. 390 U.S. at 641–42. Under rationality review, the Court found that it could not state that the statute's regulation of *obscenity* had "no rational relation to the objective of safeguarding such minors from harm."[31] *Id.* at 643. In this case, the court is not reviewing regulations that deal with obscenity, nor is the court operating under rationality review.

The congressional sponsors do not offer any evidence of a link between exposure to indecency and harm to children. Five out of the eight articles cited address materials involving violence, not indecency,[32] and the remaining three discuss sexual materials but do not account for any harm.[33] There

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[31] In fact, not only did the definition of the materials at issue in *Ginsberg* include the concept of harm, but the appellant did not argue that the obscenity in the magazines were not harmful to minors. *Ginsberg*, 390 U.S. at 635 (noting that appellant "makes no argument that the magazines are not 'harmful to minors' within the definition" in the statute).

[32] *See Enforcement Order* at 707 n.36 (citing 138 CONG. REC. at S7309–10 (June 2, 1992) (statement of Sen. Helms) (citing studies: SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE (U.S. Pub. Health Serv., 1972); Aimee D. Leifer & Donald F. Roberts, *Children's Responses to Television Violence, in* 2 TELEVISION AND SOCIAL BEHAVIOR 43–180 (U.S. Dep't of Health, Educ., and Welfare, John P. Murray et al. eds., 1972) [hereinafter TELEVISION AND SOCIAL BEHAVIOR]; Robert M. Liebert, *Television and Social Learning: Some Relationships Between Viewing Violence and Behaving Aggressively, in* 2 TELEVISION AND SOCIAL BEHAVIOR 1–42; Ellen Coughlin, *Is Violence on TV Harmful to Our Health? Some Scholars, A Vocal Minority, Say No*, THE CHRON. OF HIGHER EDUC., Mar. 13, 1985, at 5; Erik Eckholm, *Studies Link Teen-Age Suicides, TV*, N.Y. TIMES, Sept 11, 1986, at C13)).

[33] *See Enforcement Order* at 707 n.36 (citing 138 CONG. REC. at S7309–10 (citing studies: SHEARON A. LOWERY & MELVIN L. DE FLEUR, MILESTONES IN MASS COMMUNICATION RESEARCH: MEDIA EFFECTS 406–07 (2d ed. 1983); Elizabeth J. Roberts, *Television and Sexual Learning in Childhood, in* 2 TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES

simply is no evidence that indecent broadcasts harm children, the absence of which stands in striking contrast, to the wealth of research conducted on the harmful effects of televised violence.[34] In oral argument, counsel for the Commission was unable to cite to any study that found a causal connection between exposure to indecent broadcast and psychological or other harm to children. Tr. of Oral Argument at 47–51. The Government has failed to be mindful of recent Supreme Court decisions, such as *TBS* and *Edenfield*, requiring the showing of evidence before asserting that its restrictions on speech will alleviate real harms. Where the interest of protecting children conflicts with parental preferences, and where this interest is asserted with no evidence of harm, it cannot withstand exacting scrutiny. Accordingly, the only interest the Commission asserts which is indeed compelling in this context is facilitating parental supervision.

C. Least Restrictive Means

It would be hard to object to some sort of regulation of indecency in broadcast as well as other media were it narrowly tailored to facilitate parental supervision of children's exposure to indecent material. But that is not what the Government has offered. As the Supreme Court has stated, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable*, 492 U.S. at 126. The Government's chosen means, a ban on indecent speech from the hours of 6 a.m. to midnight (or until 10 p.m., the court-enforced zone), is not the least restrictive means to facilitate parental supervision.

Although unlikely, it is conceivable that such a ban on indecent programming could be the least restrictive means of facilitating parental control. For example, the Government might show that significant numbers of unsupervised children

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209–23 (Nat'l Inst. of Mental Health, David Pearl et al. eds., 1982) [hereinafter TELEVISION AND BEHAVIOR]; 1 TELEVISION AND BEHAVIOR 87 (Summary Report))).

[34] *See, e.g.*, note 2 *supra*.

were watching or listening to programs containing indecency during the hours of the ban, that parents wished to limit what their children saw or heard, and that other means of controlling such exposure was considered and found to be ineffective. In this case, the Government offers no data on actual parental supervision, parental preferences, or on the effectiveness of parental supervision at different hours of the day and night. The Commission presents no program-specific data of what children watch, despite the existence of this data. *See* Tr. of Oral Argument at 46 (in response to the court's question, concerning whether more reliable data was available—"Could the Commission collect specific data about the number of children in the audience of particular programs or particular stations by age?"—Counsel for the FCC replied, "[i]t is available and advertisers rely on it"). Without this kind of data, the Commission's decision to ban indecent broadcasting during the extensive period here in question is not narrowly tailored to serve the asserted interest of facilitating parental supervision.

More telling perhaps than the lack of data on parental supervision and the programming children watch, is the lack of any consideration of other less speech-restrictive means in the *Enforcement Order*. The Commission simply asserted:

> the broadcast indecency channeling program ... most effectively serves the compelling interest of protecting children from exposure to indecent broadcast material without intruding excessively on the rights of those entitled to present or receive such material. We therefore believe that the means chosen is the least restrictive available for the broadcast medium and that other alternatives cannot effectively further this interest.

8 F.C.C.R. 711. To what other alternatives is the Commission referring? Absent from the Commission's decision is any discussion of an alternative method. And yet, at oral argument, counsel for the FCC assured the court that blocking technology, in which a chip placed in television sets prevents certain shows from being transmitted, is available. *See* Tr. of Oral Argument at 62. This device actually facili-

tates parental supervision in allowing parents to choose what programs or stations to block; and it is undoubtedly less speech-restrictive since parents assume control.[35] In the *Alliance* case heard on the same day as this one, the Commission presented another alternative, a segregate-and-scramble scheme of indecent programming on cable's leased access channels. Again, while this may not be the best means, surely "exacting scrutiny" requires some consideration of alternatives before finding that the means chosen is the least restrictive available. The Commission's *Enforcement Order* shows no consideration of alternatives when they clearly exist. Therefore, the Commission's ban on indecent broadcast cannot be seen as the least restrictive means to facilitate parental control.

In summary, the Government's ban on indecent speech is not the least restrictive means available to further the Commission's primary compelling interest of facilitating parental supervision of their children's exposure to indecent programming.[36] The Commission has failed to show that its secondary interest, protecting children from exposure to indecent broadcast, is compelling when it conflicts with the rights of parents to rear their children in the way they see fit and when it is advanced with no evidence of harm. In applying

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[35] Counsel for the FCC noted that "[t]his [technology] really hasn't been pushed here," suggesting that the reason was expense (but citing no evidence to support the suggestion). Tr. of Oral Argument at 62. While the cost may or may not in fact be prohibitive, the Commission at a minimum should have considered less speech-restrictive options like this one.

[36] The majority finds that a 6 a.m. to midnight ban is the least restrictive means to further compelling interests and then goes on to find that a 6 a.m. to 10 p.m. ban is *also* the least restrictive means. While a 6 a.m. to 10 p.m. ban is certainly less speech restrictive than a 6 a.m. to midnight ban, it seems absurd to suggest that they are both *the least restrictive means.* As the majority itself notes, "the preferential safe harbor has the effect of undermining ... the constitutional viability of the more restrictive safe harbor that appears to have been Congress's principal objective in enacting section 16(a)."

the same level of scrutiny to regulations of broadcast as we do to regulations of cable and other media, it seems clear that section 16(a) and the *Enforcement Order* violate the First Amendment.

III. Conclusion

The Constitution prohibits the Government from infringing on the free speech rights of its citizens without showing that a content-based regulation is the least restrictive means to further compelling interests. The Government's ban on indecent speech fails to pass exacting scrutiny. I would vacate the FCC's *Enforcement Order* and hold section 16(a) of the Public Telecommunications Act of 1992 unconstitutional.

WALD, *Circuit Judge*, with whom ROGERS and TATEL, *Circuit Judges*, join, dissenting: "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994). Very often this principle is not such an easy one to live up to or to live with. But presumptively, expression that many or even most of us find deeply reprehensible may not be, on that basis alone, proscribed. In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2550 (1992), for instance, the Court held that racist fighting words could not be penalized on the basis of the hatred they expressed. Thus, whatever our collective interests in a "meritorious polity" and the moral development of the "people [who] govern it," Majority Opinion ("Maj. op.") at 17, governmental enforcement of those interests is radically constrained by the First Amendment's guarantee of freedom of expression.

This principle of free speech admits of limited exceptions, one of which is the permissibility of some government regulation of broadcast indecency. In *FCC v. Pacifica Foundation*, 438 U.S. 726, 729, 750–51 (1978), for example, the Supreme Court concluded that the Federal Communications Commission could constitutionally penalize the daytime broadcast of a dialogue containing the repeated use of "filthy words." As Chief Judge Edwards notes, *Pacifica*'s result rested in large part on technological assumptions about the uniqueness of broadcast that have changed significantly in recent years, and the time may be ripe for the Court to recognize those changes by reevaluating its decision in that case. I believe, however, that the "safe harbor" proposed by the government here is unconstitutional even if the Court does not reconsider *Pacifica*.

Because indecent speech is fully within the ambit of First Amendment protection, the permissibility of government reg-

ulation of indecency depends crucially on the distinction between *banning* and *channelling* speech. Even *Pacifica* did not, by any stretch of the imagination, grant the government discretion to censor broadcast indecency however it pleased. Rather, *Pacifica* was "an emphatically narrow holding," *Sable Communications v. FCC*, 492 U.S. 115, 127 (1989), addressed solely to the Commission's single enforcement decision on review in that case and with the understanding that the Commission " 'never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.' " *Pacifica*, 438 U.S. at 733. In keeping with this emphasis on channelling, the Court noted in *Sable* that the "most obvious [ ]"—and salient—distinction between the telephone indecency ban at issue in that case and in *Pacifica* was that *Pacifica* "did not involve a total ban on broadcasting indecent material." 492 U.S. at 127. As this court has held, an outright *ban* on broadcast indecency is unconstitutional. *See Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991) ("*ACT II*"); *see also Alliance for Community Media v. FCC*, No. 93–1169, slip op. at 11 (D.C. Cir. June 6, 1995) ("If decisions of cable operators not to carry indecent programs . . . were treated as decisions of the government, the Commission and the United States would be hard put to defend the constitutionality of these provisions.").

Because the channelling of indecency effectuates a very delicate balance between the uncontestable First Amendment rights of adult viewers and the interests of parents (or society) in protecting immature children from indecent material—interests I discuss at greater length below—the design of the channelling is of utmost constitutional import. This the majority recognizes, in theory if not in fact: "The question, then, is what period will serve the compelling governmental interests *without unduly infringing on the adult population's right to see and hear indecent material*." Maj. op. at 21 (emphasis added); *see also Alliance for Community Media v. FCC*, slip op. at 33 ("[I]n fashioning such a regulation, the government must strive to accommodate at least two competing interests: the interest in limiting children's expo-

sure to indecency and the interest of adults in having access to such material."); *id.*, dissenting op. of Judge Wald at 16 ("[A] regulation can be the *most* effective means of achieving a compelling interest and still run afoul of the First Amendment if it burdens substantial amounts of protected speech beyond what would be reasonably effective in serving the compelling interest.").

Thus, although the use of channelling as a regulatory tool is a distinct and largely uncharted area of First Amendment law, the majority and I are in agreement that its precision and care hold the constitutional passkey to permissible regulation. Like any content-based restriction on speech, the regulation of broadcast indecency must be narrowly tailored to a compelling government interest and it must avoid undue "infringe[ment] on the adult population's right to see and hear indecent material." Maj. op. at 21.

It is in implementing this balance that I part decisively with the majority. Any time-based ban on the airing of indecency intrudes substantially into the rights of adult viewers and listeners and places the government in the extraordinarily sensitive role of censor. By now, at least in the posture of the current case, it is probably too late to revisit our conclusion that the chill brought about by the Commission's open-textured definition of indecency is insufficiently great to invalidate the regulation. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338–40 (D.C. Cir. 1988) ("*ACT I*"). Even a cursory glance at the Commission's enforcement policy to date, however, suggests that that chill is quite substantial, heightening the need for a meaningful safe harbor.[1]

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[1] In light of the Commission's dramatically expanding enforcement policy—from the period extending several years beyond *Pacifica* in which the Commission only enforced the regulation against broadcasts substantially similar to the "filthy words" monologue penalized in that case to the current, ever-increasing reach of Commission enforcement—I am at a loss to understand the majority's conclusion that "[w]hatever chilling effects may be said to inhere in the regulation ... have existed ever since the Supreme

Because the Commission insists that indecency determinations must be made on a case-by-case basis and depend upon a multi-faceted consideration of the context of allegedly indecent material, broadcasters have next-to-no guidance in making complex judgment calls. Even an all clear signal in one case cannot be relied upon by broadcasters "unless both the substance of the material they aired and the context in which it was aired were substantially similar." *Sagittarius Broadcasting Corp.*, Notice of Apparent Liability, 7 F.C.C.R. 6873, 6874 (1992). Thus, conscientious broadcasters and radio and television hosts seeking to steer clear of indecency face the herculean task of predicting on the basis of a series of hazy case-by-case determinations by the Commission which side of the line their program will fall on. When, for instance, radio station hosts read over the air from a Playboy Magazine interview of Jessica Hahn about her alleged rape by the Reverend Jim Bakker, they did not regard the material as indecent because it involved matters of obvious public concern. The Commission, however, issued a notice of apparent liability for a forfeiture of $2,000, explaining that, "while the newsworthy nature of broadcast material and its presentation in a serious, newsworthy manner would be relevant contextual considerations in an indecency determination, they are not, in themselves, dispositive factors." *KSD–FM*, Notice of Apparent Liability, 6 F.C.C.R. 3689, 3689 (1990). Newsworthiness, the Commission explained, is "simply one of many variables"; no single feature renders a work *per se* not indecent. *Id.* Although in reading the interview, the hosts had said that the account made them "sick," that it described rape rather than consensual sex, and that they regretted their earlier jokes about the incident, the Commission concluded, without elaboration, that the presentation was "pandering." *Id.* at 3689–90. As this one case exemplifies so well, in enforcing the indecency regulations the Commission takes upon itself a delicate and inevitably subjective role of drawing

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Court first upheld the FCC's enforcement of section 1464 of the Radio Act." Maj. op. at 24. As broadcasters learn of the Commission's more aggressive stance, their prophylactic measures are bound to increase.

fine lines between "serious" and "pandering" presentations. And even a "serious" presentation of newsworthy material is emphatically not shielded from liability. This incident and the Commission's discussion of it suggests that enforcement of its indecency regulation involves both government- and self-censorship of much material that presents far harder choices than the glaring examples of smut emphasized to such rhetorical effect by the majority. Maj. op. at 6, 12.

Because of this potential for significant incursion into the First Amendment rights of adult viewers and listeners during the hours of the day and evening when the ban is in effect, it is particularly important that the channelling "balance" struck by the government preserve a meaningful place on the spectrum for adult rights to hear and view controversial or graphic nonobscene material—that airing of such material not be restricted to a safe harbor that is in reality a ship's graveyard. Thus, I cannot agree with the majority that determining the perimeter of the safe harbor can be relegated to the category of discretionary line-drawing akin to the distance from polls at which electioneering is allowed and so largely shielded from judicial review. Maj. op. at 25. God or the Devil (pick your figure of speech) is in the details. Because the safe harbor constitutes the exclusive repository for the substantial First Amendment rights of adults, its boundaries are of "constitutional dimension." *Cf. Burson v. Freeman*, 112 S. Ct. 1848, 1857 (1992). For that reason, it cannot be beyond the competence of this court to ensure that the safe harbor ensures *meaningful* as opposed to *pro forma* accommodation of adult rights.

On the basis of the information given us by the Commission and that was before Congress, it is impossible to conclude that the midnight to 6 a.m. safe harbor strikes a constitutionally acceptable balance. Recent Supreme Court cases have made clear that "[w]hen the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material

way." *Turner*, 114 S. Ct. at 2470 (internal quotations omitted). In light of so exacting a standard, one must, from the very outset, entertain grave misgivings about the designation of the midnight to 6 a.m. boundaries.[2] Without a clear exposition of the scope of the government's interest, we cannot know whether its means are tailored to be the least restrictive available. *See Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) ("the extent of the restriction on protected speech [must be] in reasonable proportion to the interests served"). Yet, in the record before Congress, there is as little evidence regarding the magnitude of psychological or moral harm, if any, to children and teenagers who see and hear indecency as there is that such exposure even occurs inside the current safe harbor. In the six years that the safe harbor has been operating from 8 p.m. to 6 a.m., and the prior years in which it covered 10 p.m. to 6 a.m., the government has adduced no concrete evidence of real or even potential harm suffered by the exposure of children to indecent material. We have not a scintilla of evidence as to how many allegedly indecent programs have been either aired or seen or heard by children inside or outside the safe harbor. Thus, even if the government were allowed to presume harm from mere exposure to indecency, surely it cannot progressively constrict the safe harbor in the absence of *any* indication that the presumed harm is even occurring under the existing regime.

Even if the government were acting on a *tabula rasa*, rather than on the basis of years of experience with a less restrictive ban, its delineation of the midnight to 6 a.m. safe harbor would be unjustifiable. I agree with Chief Judge Edwards that the primary government interest here must be in facilitating parental supervision of children. Although the Supreme Court has recognized the government's own interest in protecting children from exposure to indecency, it has

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[2] Although the end result of the majority's decision is to extend the safe harbor from 10 p.m. to 6 a.m., it holds that so long as Congress enacts a uniform rule, the midnight to 6 a.m. safe harbor is constitutionally adequate. Accordingly, I address my discussion to the narrower safe harbor.

never identified this interest as one that could supersede the parental interest. The government's protective responsibility in a matter of morals is, as the majority recognizes, "complementary" to that of parents. Maj. op. at 17. Thus, although the majority speaks broadly of the government's independent interest in shielding children from indecency, Maj. op. at 15–16, it recognizes—as it must—that this interest is circumscribed; absent neglect or abuse, it cannot rise *above* the parental interest in childrearing. Maj. op. at 18 (parents who wish may expose their children to indecency). In the end, the majority admits the government's own interest in children is limited to "shielding minors from being exposed to indecent speech by persons other than a parent." Maj. op. at 18.

The majority is right: the government's primary if not exclusive interest is in "shielding minors from being exposed to indecent speech by persons other than a parent." Given the significant First Amendment rights of adults at stake, moreover, the government has a constitutional responsibility to key its response to the presumed harm from indecency to facilitating parental control, rather than to government censorship *per se*. When most parents are presumably able to supervise their children, adult viewers should have access to the speech to which they are entitled. *See Pacifica Foundation v. FCC*, 556 F.2d 9, 36 (D.C. Cir. 1977) (Leventhal, J., dissenting) ("A ruling expanding the zone of the broadcastable to adult levels might apply when the time of broadcast is such that the great preponderance of children are subject to parental control.").

Because the government can pursue whatever legitimate interests it has in protecting children by facilitating parental control, I do not believe that it can impose a valid ban during any hours it pleases solely because some children are in the audience. Nor do I believe that we can throw up our hands at the assumed impossibility of parental supervision simply because large numbers of children have television sets in their own room. Either or both of these excuses would justify a 24-hour ban as easily as the current 18-hour ban. Reasoning along these lines totally ignores the adult First

Amendment interest that the majority purportedly recognizes and, effectively, gives the government unharnessed power to censor.

Instead, the scope of any safe harbor can only be responsibly justified in the terms that the government emphasized at oral argument. Counsel for the government maintained that its primary interest is in assisting parents to control their children's viewing and that the function of a safe harbor is to support this interest by identifying for parents a reasonable time period during which they must exert their supervisory function.[3] A safe harbor, so tailored, may well be a constitutionally acceptable means of furthering society's interest in protecting children.[4] Advancement of *this* justification, however, requires careful tailoring of a sort completely neglected by the government. Though it may be entirely logical for the government to assist parents by purging the airwaves of indecency during certain hours when parental supervision typically is at a low ebb, the government should be put to the task of demonstrating that the banned hours are based on a

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[3] To the extent that the majority suggests that deferring to the judgment of elected official is appropriate, it is interesting to note that the American public appears to agree that the primary burden of protecting children from indecency should be on parents. While 83% of those surveyed in a recent poll believe that the entertainment industry "should make a serious effort to reduce sex and violence in movies and music and on TV," most placed the blame on parents for exposing children to sex and violence on TV. 63% felt that the federal government should not "become involved in restricting sex and violence presented by the entertainment industry." Sam Ward, *Most Want Less Sex, Violence in Movies and Music, on TV,* USA TODAY, June 9, 1995, at 4A.

[4] This assessment, of course, is made in light of the currently available means. At the moment I write, Congress is actively considering requiring a "V-chip" in all new television sets that would enable parents to block offensive speech whenever broadcast and a rating system giving the advance information on questionable programs. As such technology advances and becomes universally available, the government bears the continuing obligation to ensure that its means of regulating indecency are the least restrictive among all those available.

showing that these are the times of preponderant children viewing and the times when parents are otherwise absorbed in work in or out of the home. As the initial panel opinion explained, "[t]he Commission[ ] ... appears to assume that, regardless of the time of day or night, parents cannot effectively supervise their children's television or radio habits. Accordingly, the government has not adduced any evidence suggesting that the effectiveness of parental supervision varies by time of day or night, or that the particular safe harbor from midnight to 6 a.m. was crafted to assist parents at specific times when they especially require the government's help to supervise their children." *Action for Children's Television v. FCC*, 11 F.3d 170, 178 (D.C. Cir. 1993) ("*ACT III*").

In constructing a safe harbor the government needs to give more careful consideration to those hours in the evening when parental control could reasonably be relied upon in lieu of censorship to protect children. It is only in this manner that the government can genuinely strike the delicate balance between adult freedoms of expression and society's interest in shielding children from indecency and a truly safe harbor can be crafted that "serve[s] the compelling governmental interests without unduly infringing on the adult population's right to see and hear indecent material." Maj. op. at 21.

Despite the majority's valiant effort to extract evidence for the government's position from the sparse record before us, the pickings are too slim for constitutional legitimacy. *See Turner*, 114 S. Ct. at 2470, 2471 (rejecting record that included "unusually detailed statutory findings," *id.* at 2461, as insufficiently detailed to survive *intermediate* scrutiny under the First Amendment). There is no evidence at all of psychological harm from exposure to indecent programs aired inside the current safe harbor. There is no evidence either that parents cannot supervise their children in those safe harbor hours or that "grazing" is leading to any significant viewing of indecency.[5] Finally, the imminence of "V-chip" technology to enable parental control of all violence- and indecency-viewing

[5] The station-specific data we requested in *ACT I* and *ACT II* is nowhere to be found in the record. *See ACT II*, 932 F.2d at 1510.

suggests that a draconian ban from 6 a.m. to midnight is decidedly premature.

In spite of this evidentiary black hole, we have a broadside ban on vaguely defined indecency during all hours when most working people are awake, with a small bow to prior judicial rulings that a complete ban is unconstitutional, but no attempt to fashion an accommodation between the First Amendment and family values. The net effect of the majority's decision is a gratuitous grant of power allowing casual and lightly reviewed administrative decisionmaking about fundamental liberties. I respectfully dissent.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1993 Decided November 23, 1993

No. 93-1092

ACTION FOR CHILDREN'S TELEVISION;
AMERICAN CIVIL LIBERTIES UNION;
THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.;
CAPITAL CITIES/ABC, INC.;
CBS INC.;
FOX TELEVISION STATIONS, INC.;
GREATER MEDIA, INC.;
INFINITY BROADCASTING CORPORATION;
MOTION PICTURE ASSOCIATION OF AMERICA, INC.;
NATIONAL ASSOCIATION OF BROADCASTERS;
NATIONAL PUBLIC RADIO;
PEOPLE FOR THE AMERICAN WAY;
POST-NEWSWEEK STATIONS, INC.;
PUBLIC BROADCASTING SERVICE;
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION;

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
SOCIETY OF PROFESSIONAL JOURNALISTS,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

MORALITY IN MEDIA;
NATIONAL FAMILY LEGAL FOUNDATION;
AMERICAN FAMILY ASSOCIATION;
FOCUS ON THE FAMILY;
NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES;
CONCERNED WOMEN OF AMERICA;
NATIONAL COALITION AGAINST PORNOGRAPHY;
NATIONAL ASSOCIATION OF EVANGELICALS;
RELIGIOUS ALLIANCE AGAINST PORNOGRAPHY;
FAMILY RESEARCH COUNCIL;
NATIONAL RELIGIOUS BROADCASTERS,
AMICI CURIAE

No. 93-1100

PACIFICA FOUNDATION;
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS;
AMERICAN PUBLIC RADIO;

NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS;
INTERCOLLEGIATE BROADCAST SYSTEM;
PEN AMERICAN CENTER;
ALLEN GINSBERG,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

Petition for Review of an Order
of the Federal Communications Commission

Timothy B. Dyk argued the cause for petitioners Action for Children's Television, *et al.*, in No. 93–1092. With him on the joint brief were *Barbara McDowell, Marjorie Heins, James J. Popham, Molly Pauker, Steven A. Lerman, Dennis P. Corbett, Laura B. Humphries, John P. Crigler, Elliot M. Mincberg, Henry L. Baumann, Steven A. Bookshester, Theodore A. Miles, Karen Christensen, Eric M. Lieberman, Thomas C. Viles, Andrew J. Schwartzman, Jonathan D. Blake, Paula A. Jameson, Nancy H. Hendry, Joseph L. Scharff, Jane E. Kirtley, Bruce W. Sanford and Henry S. Hoberman.* *Steven R. Shapiro* entered an appearance for petitioner American Civil Liberties Union in No. 93–1092. *Martin Wald* entered an appearance for petitioner Post–Newsweek Stations, Inc., in No. 93–1092.

Eric M. Lieberman argued the cause for petitioners Pacifica Foundation, *et al.*, in No. 93–1100. With him on the brief was *John P. Crigler.* *Thomas C. Viles* entered an appearance for petitioners in No. 93–1100.

Jane E. Mago, Assistant General Counsel, Federal Communications Commission, argued the cause for respondents.

With her on the brief were *Renee Licht*, Acting General Counsel, *Daniel McMullen Armstrong*, Assistant General Counsel, *Clifford G. Pash, Jr.*, and *Peter A. Tenhula*, Counsel, Federal Communications Commission, and *Barbara L. Herwig* and *Jacob M. Lewis*, Attorneys, United States Department of Justice.

On the joint brief for *amici curiae* were *George R. Grange*, *James P. Mueller* and *Paul J. McGeady*.

Before MIKVA, *Chief Judge*, WALD and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

Opinion concurring specially filed by *Circuit Judge* EDWARDS.

WALD, *Circuit Judge*: Petitioners, a group of broadcasters, authors, program suppliers, listeners, and viewers challenge the constitutionality of a Federal Communications Commission ("FCC" or "Commission") order, issued at the direction of Congress, banning "indecent" material from broadcasting during the hours from 6 a.m. to midnight.[1] While we break some new ground, our decision that the ban violates the First Amendment relies principally upon two prior decisions of this court in which we addressed similar challenges to FCC orders restricting the broadcasting of "indecent" material, as defined by the FCC. *See Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"), *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) ("*ACT II*").

The FCC invokes three goals to justify the regulations: (i) "ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts,"

[1] Petitioners challenge the constitutionality of section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992), and the FCC's implementing order, *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704 (1993).

(ii) "ensuring the well being of minors" regardless of parental supervision, and (iii) protecting "the right of all members of the public to be free of indecent material in the privacy of their homes." *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704, 705–706 ¶¶ 10, 14 (1993) ("*1993 Order*"). *See* Respondents' Brief at 14. For reasons stated below, we find the third interest, protecting the general public, insufficient to support a restriction on the broadcasting of constitutionally protected "indecent" material; we accept as compelling the first two interests involving the welfare of children, but in our view, the FCC and Congress have failed to tailor their efforts to advance these interests in a sufficiently narrow way to meet constitutional standards.

I. Background

Since the Radio Act of 1927, federal law has prohibited the broadcasting of "indecent" material. 18 U.S.C. § 1464.[2] *See* Radio Act of 1927, Pub. L. No. 69–632, § 29, 44 Stat. 1162, 1172–73; *FCC v. Pacifica Found.*, 438 U.S. 726, 735–38 (1978) ("*Pacifica*") (discussing statutory history of indecency regulation).[3] The Commission interpreted the "concept of 'indecent' [to be] intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica Found.*, 56 F.C.C.2d 94, 98 (1975), *quoted in Pacifica*, 438 U.S. at 731–32.

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[2] Section 1464 provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1464.

[3] *ACT II* details the early history of this trilogy of "indecency" cases. We will report only as much as necessary to inform this opinion, adding recent and relevant developments. *See ACT II*, 932 F.2d at 1506–07.

In 1978, the Supreme Court upheld an FCC decision finding "indecent" a monologue by entertainer George Carlin entitled "Filthy Words" broadcast over radio at 2 o'clock in the afternoon. *Pacifica*, 438 U.S. at 734–35, 750–51. For the next decade the Commission limited itself to enforcing the § 1464 indecency ban only against material involving "the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930 ¶ 4 (1987) ("Reconsideration Order"). In addition, the Commission took no action against broadcasters who broadcast indecent but not obscene material after 10 p.m. *Id.*

In 1987 the Commission broadened its enforcement of § 1464 by issuing a ruling which affirmed, on reconsideration, three prior rulings against broadcasters for airing indecent material. *Reconsideration Order*, 3 F.C.C.R. 930.[4] First, the Commission narrowed the safe harbor period for "indecent" material to the hours between midnight and 6 a.m.; second, it broadened its enforcement of § 1464 to include all material encompassed by its description of "indecency" rather than only the "Filthy Words" category. The Commission also abandoned reliance on the time of broadcast as an element of the determination of whether material was "indecent." It now considered broadcast time only as a factor in the decision of whether to take action against "indecent" broadcasting. *See ACT I*, 852 F.2d at 1338 n.8. Today, the FCC "defines broadcast indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *1993 Order*, 8 F.C.C.R. at 704–5 ¶ 4 n.10. This does not appear materially different from the definition considered in *ACT I*.

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[4] The order upheld, on reconsideration, the FCC's prior rulings in *In re Infinity Broadcasting Corp. of Pa.*, 2 F.C.C.R. 2705 (1987); *In re Pacifica Found.*, 2 F.C.C.R. 2698 (1987); *In re Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987).

The Reconsideration Order was the subject matter of *ACT I*, which upheld the indecency standard promulgated by the FCC against vagueness and overbreadth challenges in light of the Commission's "avowed objective . . . not to establish itself as a censor but to *assist parents* in controlling the material young children will hear." 852 F.2d at 1334 (emphasis in original). *See also id.* at 1343. However, *ACT I* struck down the contraction of the safe harbor period to midnight through 6 a.m. as unjustified by the record. *Id.* at 1334. In particular, the *ACT I* court noted that the Commission had not explained its expansion of the definition of protected "children" from below–12 years of age to adolescents from 12–17, and moreover, had merely estimated "the number of teens in the *total* . . . audience," and not adduced any specific audience data for the "specific . . . stations" that were alleged to have placed children at risk of exposure to indecent material. *Id.* at 1341 (emphasis in original). *See id.* at 1341–44.

Following *ACT I*, Congress passed an appropriations rider which directed the FCC to promulgate regulations for the enforcement of § 1464 on a 24–hour per day basis. Pub. L. No. 100–459, § 608, 102 Stat. 2186, 2228 (1988). The FCC conducted rulemaking proceedings in support of the 24 hour ban in 1989–90. *See In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358 (1989) (notice of inquiry) ("1989 NOI"); 5 F.C.C.R. 5297 (1990) ("1990 Report"). This court in *ACT II* struck down the 24–hour prohibition on broadcasting of indecent material. 932 F.2d at 1510. The court relied largely on its interpretation of *ACT I* as requiring that *some* safe harbor for broadcasting indecent material be maintained, and that even "Congress itself" could not totally ban indecent speech. *Id.* at 1509. Since the decision in *ACT II* "effectively return[ed] the Commission to the position it briefly occupied after *ACT I* and prior to congressional adoption of" the 24–hour ban, we directed the Commission to resume its rulemaking to determine the factual issues as mandated by *ACT I*: "among them, the appropriate definitions of 'children' and 'reasonable risk' [of exposure to indecent material] for channeling purposes, the paucity of station- or program-specific audience

data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts." *ACT II*, 932 F.2d at 1510 (citing *ACT I*, 852 F.2d at 1341–44).

Before the Commission could initiate hearings after *ACT II*, Congress intervened once again, passing the Public Telecommunications Act of 1992, Pub. L. No. 102–356, 106 Stat. 949 (1992) ("Telecommunications Act"), which in section 16(a) required the Commission to promulgate a new rule barring indecent material during the broadcast hours from 6 a.m. to midnight, but allowing public broadcast stations that go off the air at or before midnight an additional two hours (between 10 p.m. and midnight) during which they may broadcast "indecent" material. *Id.* at § 16(a), 106 Stat. at 954. Since "Congress ha[d] balanced the competing interests affected by the regulation of broadcast indecency and ha[d] determined that a 12 midnight-to-6 a.m. safe harbor properly effectuates those interests[, t]he focus of th[e ensuing rulemaking] proceeding [was] ... confined to the matter of updating the Commission's record pertaining to the governmental interest in restricting the broadcasting of indecent material." *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 7 F.C.C.R. 6464, 6465 ¶ 9 (1992) (notice of proposed rulemaking) ("1992 NPRM") (footnote omitted).

The Commission subsequently released a Report and Order which articulated the government's interests as (i) "ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts," (ii) "ensuring the well being of minors" regardless of parental supervision, and (iii) protecting "the right of all members of the public to be free of indecent material in the privacy of their homes." *1993 Order*, 8 F.C.C.R. at 705–06 ¶¶ 10, 14. The resulting regulations track section 16 of the Telecommunications Act, prohibiting public radio and television stations that go off the air on or before midnight from airing indecent material between 6 a.m. and 10 p.m., and prohibiting all other

broadcast stations from airing indecent material between the hours of 6 a.m. and midnight. *Id.* at 711 (Appendix A) (to be codified at 47 C.F.R. § 73.3999).

Petitioners seek review of these regulations, charging primarily that they are unconstitutional first, because they are not narrowly enough tailored to meet First Amendment standards, and second, because the exception they make for public broadcast stations that go off the air on or before midnight violates the equal protection of the laws. The Commission's 1993 Order has been stayed pending review. *Action for Children's Television v. FCC*, No. 93–1092 (D.C. Cir. Jul. 23, 1993) (order filed). Because we conclude that the basic 6 a.m.-to-midnight ban, despite compelling interests regarding the protection of children, is not sufficiently narrow to meet constitutional requirements, we do not reach petitioners' equal protection challenge to the additional 10 p.m.-to-midnight safe harbor granted only to public broadcast stations going off the air before midnight.[5]

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[5] Petitioners contend that this case is "controlled by *ACT I* and *ACT II*, which recognize that a 6 a.m.-to-midnight indecency prohibition is unconstitutional." Joint Brief of Petitioners at 17. There is one significant difference between those cases and this one, however. In *ACT I* we determined that in adopting a 6 a.m.-to-midnight ban on broadcasting indecent material, the FCC *as an agency* had not adequately justified its *change* in policy. *See, e.g.*, 852 F.2d at 1342 ("apparent change in policy warrants explanation"). Congress is under no such obligation to justify its *change* in policy, and is free to alter its delegation to an agency. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 955 (1983) (Congress is free "legislatively [to] alter[ ] or revoke[ ]" its "delegation of authority" (footnote omitted)). Of course, where the First Amendment is involved, we do not defer entirely to legislative findings, *see, e.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989), but when examining the constitutionality of a regulation the terms of which are spelled out by Congress and leave no room for agency discretion, we are, in effect, reviewing the underlying statute for conformity with the Constitution rather than reviewing a regulation for conformity with the Administrative Procedure Act, 5 U.S.C. §§ 551–706. *Cf. ACT II*, 932 F.2d 1504.

To clear the channels for our subsequent discussion, we reiterate accepted doctrine that (i) indecent speech is protected by the First Amendment, *see ACT II*, 932 F.2d at 1509; *ACT I*, 852 F.2d at 1340, and (ii) the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). *See Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *ACT II*, 932 F.2d at 1509; *ACT I*, 852 F.2d at 1343 n.18.

II. Protection of Adults

Relying mainly on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the government maintains that the 6 a.m.-to-midnight ban promotes its compelling interest in protecting the privacy of every American's home. *See* Respondents' Brief at 23, *1993 Order*, 8 F.C.C.R. at 706 ¶ 14. It argues that *Pacifica* acknowledges the " 'uniquely pervasive presence' " of broadcasting which invades residential privacy where " 'the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.' " Respondents' Brief at 23 (quoting *Pacifica*, 438 U.S. at 748). This inherently intrusive nature of broadcasting, the government contends, permits it to ban indecent material from the airwaves during all but the hours when most people are asleep.

The Supreme Court in *Pacifica* held that the FCC had the authority to sanction a licensee who broadcast the indecent Carlin monologue at 2 o'clock in the afternoon. 438 U.S. at 735, 750–51. *Pacifica* was a quite narrow decision upholding only the ruling of the FCC sanctioning specific words in a specific context broadcast at a specific time of day. *Id.* at 750 ("It is appropriate ... to emphasize the narrowness of our holding."); *id.* at 755–56 (Powell, J., concurring).[6] The Court

[6] While *ACT I* acknowledges that *Pacifica* "identified" an interest in "protecting the adult listener from intrusion, in the form of

expressly cautioned that it was not endorsing the reasoning of the underlying FCC ruling,[7] but only its ultimate holding that the Carlin monologue on "Filthy Words" as broadcast at 2 p.m. violated the indecency ban of § 1464. *Id.* at 734–35. Indeed, the Supreme Court's decision might well be read as limited to situations in which children must be protected from exposure to indecent material. Although an adult had been listening to the program with his son, *id.* at 730, the Court went out of its way to emphasize the limits of its ruling by cautioning that "whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided." *Id.* at 750 n.28. Therefore, despite recognition of the "relevance" of the privacy interest, *id.* at 748, *Pacifica* did not rest its holding on a general privacy rationale applicable to adults and children alike. *See id.* at 750 ("The ease with which children may obtain access to broadcast material, coupled with the concerns [relating to children] recognized in *Ginsberg[v. New York*, 390 U.S. 629 (1968)], amply justify special treatment of indecent broadcasting."); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("In ... *Pacifica* ... this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children." (footnote omitted)); *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("[W]e held [in *Pacifica*] that the Government's interest in the 'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children." (citation omitted)).[8]

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offensive broadcast materials, into the privacy of the home," it does not endorse its legitimacy. *ACT I*, 852 F.2d at 1344 n.20.

[7] The underlying FCC ruling had advanced the protection of unconsenting adult listeners as one purpose of the restriction on indecent material. *See Pacifica*, 438 U.S. at 731 n.2.

[8] Similarly, the government relies too broadly on the Supreme Court's decision in *Sable* for the proposition that the unique characteristics of the broadcast medium warrant restrictions protecting the privacy of the home that might be impermissible in other

We too are reluctant to recognize any generalized government interest in protecting adults from indecent speech, primarily because the official suppression of constitutionally protected speech runs counter to the fundamental principle of the First Amendment "that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *Accord Hustler Magazine v. Falwell*, 485 U.S. 46, 55–56 (1988). While we recognize that in broadcasting the First Amendment primarily protects "the right of the viewers and listeners, not the right of the broadcasters," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citation omitted), we note that by the same token, the First Amendment protects the rights of *all* listeners and viewers—not just of that part of the audience whose listening and viewing habits meet with government approval. Therefore, " '[a]t least where obscenity is not involved, [the Supreme Court] ha[s] consistently held that the fact that protected speech may be offensive to some does not justify its suppression.' " *Bolger*, 463 U.S. at 71 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977)).

Bolger, in striking down a complete ban on unsolicited mailings of contraceptive advertisements, noted that in order to permit the suppression of speech solely on the ground that it is offensive to some, the government must show that the audience is "captive" and cannot avoid the objectionable

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contexts. *Sable* struck down a complete ban on indecent telephone messages, and *distinguished Pacifica* as an "emphatically narrow holding" that relied not only on "the 'unique' attributes of broadcasting," *i.e.* its " 'uniquely pervasive,' [nature that] can intrude on the privacy of the home without prior warning as to program content," but also on the fact that it is " 'uniquely accessible to children, even those too young to read.' " *Sable*, 492 U.S. at 127 (quoting *Pacifica*, 438 U.S. at 748–49). *Accord Bolger*, 463 U.S. at 74 (similarly distinguishing mailings from broadcast reception). *Sable* noted that a person who places a telephone call exercises more control over the message received than does the listener who flips on the radio. 492 U.S. at 128. More important, however, *Sable* ultimately refused to adopt any general privacy rationale in the telephone context. *Id.*

speech. *Id.* at 72. *See also Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538–42 (1980) (striking down subject-matter restriction on public utility's bill inserts where utility bill readers were not captive audience); *Frisby v. Schultz*, 487 U.S. 474, 484–87 (1988) (upholding restriction on residential picketing because target of the focused picketing is a captive audience); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding selective grant of advertisement space in rapid transit cars where audience is captive). We refrain, however, from extending the captive audience rationale to the context of scheduled broadcast programming. *Cf. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127–28 (1973) (noting that broadcast audience is captive with respect to advertisements that interrupt scheduled programs).[9] Viewers and listeners of scheduled programs do retain options that the resident who is involuntarily picketed, or the commuter who must use public transportation in order to earn her livelihood does not. Viewers and listeners retain the option of using program guides to select with care the programs they wish to view or hear. Occasional exposure to offensive material in scheduled programming is of roughly the same order that confronts the reader browsing in a bookstore. And as a last resort, unlike residential picketing or public transportation advertising "the radio [and television] can be

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[9] Recognition of the "captive" nature of the broadcast audience with respect to advertisements does not grant the government *carte blanche* for the suppression of ideas. For example, *Columbia Broadcasting* quotes *Banzhaf v. FCC*, 405 F.2d 1082, 1100–01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), as a case recognizing the captive nature of the broadcast audience with respect to commercials. *Columbia Broadcasting*, 412 U.S. at 128. In *Banzhaf*, however, this court upheld an FCC ruling that required broadcasters who air cigarette commercials to *grant reply time* to anti-smoking groups, noting specifically that "not only does the cigarette ruling not repress any information, it serves affirmatively to provide information." *Banzhaf*, 405 F.2d at 1103. *Banzhaf* involved no suppression of television commercials due to the captive nature of the audience, but to the contrary only required that supplementary informative material be broadcast.

turned off." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (unanimous). *See Lehman*, 418 U.S. 302 (plurality) (quoting same).

Even if we were to accord some measure of legitimacy to the government's interest in protecting the privacy of the home from unwelcome broadcast material, the government has undermined its own reliance on that interest, by arguing that " 'submission of market-wide data demonstrating that there is no appreciable child audience during the relevant time period would raise a viable defense to a charge of indecency outside of the safe harbor [time period].' " Respondents' Brief at 39 (quoting *1993 Order*, 8 F.C.C.R. at 710 ¶ 37, and citing *1990 Report*, 5 F.C.C.R. at 5309 ¶¶ 89–90). Validation of this potential defense to a charge of indecent broadcasting reveals the government's true concern as the protection of children—not adults—from indecent broadcasting. Since the asserted interest in protecting adults falls completely out of the picture with the disappearance of children in the audience, we must assume that the purpose of the ban is to protect only the children.[10] We consequently

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[10] The Commission similarly undermines its own reliance on *Pacifica* 's dictum that " '[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.' " Respondent's Brief at 24 (quoting *Pacifica*, 438 U.S. at 748–49). The Commission tells us it would, for example, permit airing a reading of *Ulysses* not because it is entirely free of objectionable language, but because " 'we would not expect that the Commission would find such [objectionable] references, dispersed as they would have been throughout the three-hour reading of this work of literature, to be patently offensive.' " Respondent's Brief at 28 (quoting *Thomas Byrne*, at n.1 (MM Bur., April 7, 1988)).

This reasoning seems, at the least, inconsistent. A single objectionable reference under the Commission's ruling apparently would not trigger a sanction. Therefore, viewers and listeners cannot expect to be shielded from all offensive material even when enjoying FCC-approved programs. On the other hand, in the absence of any regulation of indecent material on broadcast programs, an adult retains the option of turning to another channel after the first

reject reliance on a generalized privacy rationale to justify regulation of indecent broadcasting.

III. Protection of Children

The Commission invokes two separate interests relating to children purportedly served by the 6 a.m.-to-midnight ban: (i) an interest in helping parents supervise their children, and (ii) an independent interest in shielding children from exposure to indecent material regardless of parental supervision. Recognizing that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'" *Ginsberg*, 390 U.S. at 638 (footnote omitted) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)), we acknowledge the compelling nature of both government interests in protecting children. Nevertheless, despite those compelling interests we find that the 6 a.m.-to-midnight ban is not narrowly tailored to meet constitutional standards. We address each issue in turn.

A. *The Government's Interests in the Protection of Children*

The government's interest in helping parents supervise their children has been repeatedly recognized as sufficiently important to justify restrictions on First Amendment activities. *See, e.g., Ginsberg*, 390 U.S. at 639 (upholding regulation of material that was obscene for minors, but not adults). But where constitutionally protected speech is restricted, the government must demonstrate that the restriction is narrowly tailored to advance the asserted compelling interest. *Sable*, 492 U.S. at 126–31; *ACT II*, 932 F.2d at 1509; *ACT I*, 852 F.2d at 1343–44. In *ACT I* this court held that the government could "[c]hannel[ ]" programming in order to "protect unsupervised children" but only so long as it remained "sensi-

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objectionable remark is made, thereby avoiding further intrusion. In so doing, an individual would not have suffered more intrusion than had she listened to a government-approved reading of *Ulysses*. *Cf. Bolger*, 463 U.S. at 72 (noting that generally, recipients of objectionable mailings can simply avert their eyes to avoid further bombardment, and that government can shield only a captive audience that cannot avoid objectionable speech).

tive to the first amendment interests of broadcasters, adults, and parents." 852 F.2d at 1340 & n.12.

The government's asserted interest in protecting children also includes its independent interest in protecting the well-being of vulnerable youth and in shielding them from physical and psychological abuse. The Supreme Court has recognized this interest as compelling. *Ferber*, 458 U.S. at 756–57 ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." (internal quotations and citation omitted)); *Ginsberg*, 390 U.S. at 640; *Prince*, 321 U.S. at 165. Accordingly, the Supreme Court has repeatedly upheld restrictions on First Amendment liberties if sufficiently justified by the need to protect the well-being of minors. *See Ferber*, 458 U.S. at 757. In *Pacifica*, the Supreme Court specifically held that the government "may ... prohibit[ ] ... making indecent material available to children," based, in part, upon the government's independent interest in the " 'well-being of its youth.' " *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. at 640). The government, therefore, has a compelling interest in restricting the exposure of children to indecent material in the broadcast media.

B. *Least Restrictive Means*

The government has, however, failed to demonstrate that its 6 a.m.-to-midnight ban on indecent material is the least restrictive means to advance its interests in the protection of children. *See Sable*, 492 U.S. at 126. Upon a thorough examination of the legislative and administrative record,[11] *see id.* at 129 (" 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' " (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)), we conclude that the government did not properly weigh viewers' and listeners' First Amendment rights when balancing the competing interests in determining the widest safe harbor period consistent with the protection

[11] Congress incorporated the FCC's 1990 Report into the legislative record. *See* 138 CONG. REC. S7310 (daily ed. June 2, 1992) (submission by Sen. Helms).

of children.[12] More broadly, we are at a loss to detect any reasoned analysis supporting the particular safe harbor mandated by Congress.

1. *Parental Supervision*

To begin with, the particular safe harbor chosen by Congress and the FCC is not satisfactorily explained as an attempt to prohibit the broadcasting of indecent material at times when parental supervision is apt to be least effective. Indeed, one could intuitively assume that as the evening hours wear on, parents would be better situated to keep track of their children's viewing and listening habits. The FCC, on the other hand, argues broadly that " 'parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching and listening at all times.' " Respondents' Brief at 30–31 (quoting *1993 Order*, 8 F.C.C.R. at 710 ¶ 36). Because "it is not practical for parents to exercise this type of control," *1990 Report*, 5 F.C.C.R. at 5305 ¶ 62, the FCC's argument continues, "parents who seek to avoid exposing their children to indecency face a nearly impossible task if such material is broadcast." Respondents' Brief at 26. The Commission's argument appears to assume that, regardless of the time of day or night, parents cannot effectively supervise their children's television or radio habits. Accordingly, the government has not adduced any evidence suggesting that the effectiveness of parental supervision varies by time of day or night, or that the particular safe harbor from midnight to 6 a.m. was crafted to assist parents at specific times when they especially require the government's help to supervise their children. The inevitable logic of the government's line of argument is that indecent material can never be broadcast, or, at most, can be broadcast during times when children are surely asleep; it could as well support a limited 3:00 a.m.–to–3:30 a.m. safe harbor as one from midnight to 6 a.m.

2. *Shielding Minors from Indecent Material*

Alternatively, the government has justified its safe harbor as an effort to shield all minors regardless of age from

[12] As conceded at oral argument, petitioners do not challenge the FCC's authority to regulate "indecent" material in the broadcast

exposure to indecent material. The government undoubtedly has a compelling interest in preventing exposure to indecent material of children "both old enough to understand and young enough to be adversely affected" by the indecent material. *Pacifica*, 438 U.S. at 750 n.29. Yet, while the interest in preventing children's exposure to indecent material is compelling, the grounds for restricting a minor's First Amendment rights (here as listener or viewer) fade as the minor matures.

The Supreme Court has long recognized that the Constitution does not exist for adults alone. *See In re Gault*, 387 U.S. 1, 13 (1967). "In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975) (footnote and citations omitted). *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) [13]; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 n.14 (1977) (plurality) ("minors are entitled to constitutional protection for freedom of speech" (citing *Tinker*, 393 U.S. 503)). In *Erznoznik*, the Supreme Court rejected the government's general interest in protecting minors from films containing nudity. It held that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213–14. Contrary to the government's contention, *Pacifica* did not overrule *Erznoznik*. *Pacifica* was an emphatically nar-

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media by creating a safe harbor outside of which indecent material may not be broadcast.

[13] To limit *Tinker*'s recognition of minors' First Amendment rights to the school context would stand the decision on its head. The Court in *Tinker* held that students do not "*shed* their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506 (emphasis added). Of course this assumes that minors *have* First Amendment rights outside the school context. Indeed the Court noted as much saying that "[s]tudents in school as well as out of school are 'persons' under our Constitution[, and] . . . are possessed of fundamental rights which the State must respect." *Id.* at 511.

row decision upholding an FCC ruling on the basis that it was properly aimed at preventing children's exposure to indecent material at a time when the FCC defined children as minors under the age of 12.[14] The Court was particularly concerned that "broadcasting is uniquely accessible to children, *even those too young to read*," *Pacifica*, 438 U.S. at 749 (emphasis added), and strongly implied that the Commission would *not regulate* material that "would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected" by its content. *Id.* at 750 n.29. Therefore, while *Pacifica* may have implicitly limited *Erznoznik* where very young children are involved, we do not read *Pacifica* as a wholesale dismissal of older minors' First Amendment rights that had been explicitly recognized by the Court in *Erznoznik*.[15]

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[14] The FCC contends that *Pacifica* endorses the government's power to restrict the broadcast of indecent speech to minors regardless of age, and that the government therefore need not consider the First Amendment rights of minors in the context of regulating indecent material in the broadcast media. *See* Respondents' Brief at 37–38. *Pacifica* does not reach that broadly. In *Pacifica*, the Commission's regulation of indecent broadcasting was part of an effort to protect children *under the age of 12* from "indecent" material. *See ACT I*, 852 F.2d at 1340–42 (noting that FCC's brief to the Supreme Court in *Pacifica* argued that the regulation attempted to minimize the risk of exposing children under the age of 12 to indecent material). In *ACT I* we specifically directed the FCC to explain "why it takes teens aged 12–17 to be the relevant age group for channeling purposes." 852 F.2d at 1341. The First Amendment rights of teenagers, therefore, were at issue neither in *ACT I* nor in *Pacifica*. In addition, while in *Sable*, the Supreme Court said the protection of children includes "preventing minors from being exposed to indecent" material, it ultimately struck down the ban on indecent telephone messages because it was not narrowly tailored to served that interest. *Sable*, 492 U.S. at 131.

[15] Indeed, the *Pacifica* Court apparently distinguished *Erznoznik* on the ground that it involved speech outside the home, where the interests of the offensive *speaker* sometimes outweigh those of the unwilling listener. *Pacifica*, 438 U.S. at 749 n.27. This difference,

Nevertheless, as suggested by the Court in *Ginsberg* (upon which *Pacifica* specifically relied),[16] children are afforded special treatment under the First Amendment in part because of their " 'immaturity.' " *Ginsberg*, 390 U.S. at 638 n.6 (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963)).[17] In short, children may be unable to avoid speech that adults know to be harmful to them. Therefore, "[a] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Erznoznik*, 422 U.S. at 214 n.11 (quoting *Ginsberg*, 390 U.S. at 649–50 (Stewart, J., concurring)). "In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor." *Id.* (citation omitted).[18] While a child's ability to make decisions is presumed to be inferior to an adult's, the capacity for choice does not remain

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of course, does not address the listener's or viewer's First Amendment rights.

[16] *See Pacifica*, 438 U.S. at 750 ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.").

[17] The Court in *Ginsberg* upheld a criminal obscenity statute prohibiting the sale "to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." 390 U.S. at 631. The Court noted that obscenity is not protected by the First Amendment and that the legislation before it "simply adjusts the definition of obscenity [to] ... minors." *Id.* at 638 (citation omitted). The Court had "no occasion in th[at] case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State." *Id.* at 636 (citing *In re Gault*, 387 U.S. at 13). Also, appellant in that case did not challenge the legislation's target age of 17. *See id.* at 649 n.5 (Stewart, J., concurring).

[18] *Cf. Ginsberg*, 390 U.S. at 649 n.5 (Stewart, J., concurring) ("The appellant does not challenge New York's power to draw the line at age 17, and I intimate no view upon that question.").

dormant throughout childhood until appearing *ex nihilo* upon the arrival of a person's 18th birthday. We find, for example, nowhere "in the Constitution ... the authority to distinguish between a willing 'adult' one month past the ... [legal] age of majority and a willing 'juvenile' one month younger." *Miller v. California*, 413 U.S. 15, 27 (1973). Accordingly, we conclude that the confident abrogation of a minor's First Amendment rights by a protective government must proceed by a less rigid line than the legal age of majority.

When the government affirmatively acts to suppress constitutionally protected material in order to protect teenagers as well as younger children, it must remain sensitive to the expanding First Amendment interests of maturing minors. At some point, the government's independent interest in shielding children from offensive material no longer outweighs the First Amendment interests of minors in receiving important information. *See Erznoznik*, 422 U.S. at 213 (striking down ban on films containing nudity as not justified by interest in protection of minors, noting, *inter alia*, that prohibition would extend to films containing depictions of "the nude body of a war victim, or scenes from a culture in which nudity is indigenous"); *see also Bolger*, 463 U.S. at 74–75 n.30 (noting that statute prohibiting the unsolicited mailing of contraceptive advertisements "quite clearly denies information to minors, who are entitled to 'a significant measure of First Amendment protection'" (quoting *Erznoznik*, 422 U.S. at 212 and citing *Tinker*, 393 U.S. 503)); *Carey*, 431 U.S. at 678 (striking down restriction of sale and distribution of contraceptives to minors because it would restrict the ability to "exercise the constitutionally protected right of decision in matters of childbearing," *id.* at 688–89, and striking down ban on advertisements for contraceptives, because they interfere with "substantial individual and societal interests in the free flow of commercial information ... related to activity with which, at least in some respects, the State could not interfere," notwithstanding that the advertisements may be "offensive and embarrassing ... and ... would legitimize sexual activity of young people," *id.* at 700–01 (internal quotes and citations omitted)). Here, the government has not demon-

strated that its independent interest in shielding children from indecent broadcasts automatically outweighs the child's own First Amendment rights up to her eighteenth birthday. One would assume that even where "patently offensive" material is involved, a seventeen year old does not generally warrant the same degree of governmental protection that may be appropriate for an eight year old.

In addition, even assuming that the government's interest in protecting older minors persistently outweighs the First Amendment interests of the minors themselves, the government's weaker interest in shielding older minors from indecent speech may not suffice to outweigh the adults' First Amendment interests that are sacrificed along the way. Therefore, where First Amendment rights of adults are involved, the government may not be heard to argue globally that "there is a reasonable risk that significant numbers of children ages 17 and under" are in the listening and viewing audience "at all times of the day and night." *1993 Report*, 8 F.C.C.R. at 707 ¶ 20.[19] The government must adduce data which permits a more finely tuned trade-off between adults' First Amendment rights and the government's interest in protecting children from indecent material as that interest varies in importance with their age.[20]

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[19] As concurring Commissioner Dennis noted in the 1987 Reconsideration Order on review in *ACT I*, certainly this "argument[ ] . . . in support of midnight as the critical hour may well be equally true if applied to an earlier [or later] hour." 3 F.C.C.R. 930, 938 (Comm'r Dennis, concurring).

[20] Indeed some of the data gathered by the FCC do show a considerable difference between viewing habits of younger and older children which, however, is then neglected in the FCC's conclusion as to the constant risk of significant numbers of children in the audience. For example, the 1989 NOI upon which Congress relied, *see* 138 CONG. REC. at S7309 (statement by Sen. Helms), and upon which the Commission draws, *see 1990 Report*, 5 F.C.C.R. at 5303 ¶ 51, *1993 Report*, 8 F.C.C.R. at 707-08 ¶¶ 21-23, discusses television viewing data of four selected markets, noting the "general[ ]" similarity in late evening (until 1:45 a.m.) viewing habits between children ages 12-17 and adults. *1989 NOI*, 4 F.C.C.R. at

3. *First Amendment Rights of Adults*

More generally, there is no evidence at all in the record that the government tailored its protection of children narrowly to avoid unnecessary infringement on First Amendment rights of adult listeners and viewers. Petitioners point out, as they did in *ACT I*, that the 6 a.m.-to-midnight ban "stretch[es] to all but the hours most listeners [and viewers—young and old alike—]are asleep," thus reducing the adult population to seeing and hearing only material that is fit for children. *ACT I*, 852 F.2d at 1335. *See id.* at 1341 (citing

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8362 ¶ 33. At the same time, however, the 1989 NOI noted that "[i]n contrast, the percentage of children (ages 2–11) who are viewing TV is lower than the percentage of teen/adult viewers, and generally drops to 5% or below by approximately 10:30 to 11:00 p.m. without regard to market or time of year." *Id.* While there is some subsequent evidence that in Chicago and New York 6–8% of young children (ages 2–11) have been recorded on certain dates as watching television after 10:30 p.m., *see* 138 CONG. REC. S7322 (daily ed. June 2, 1992) (submission by Sen. Helms) (incorporating reply by Salem Communications Corp. to 1990 rulemaking proceeding), *1993 Order*, 8 F.C.C.R. at 707 ¶ 22 (citing same), the Commission has not rejected its general conclusion that the percentage of younger children (ages 2–11) who are viewing television—at least outside of Chicago and New York—drops to 5% or below by approximately 10:30–11:00 p.m.

In addition, the government has not supported its regulation of radio broadcasting with any data concerning the listening habits of children under the age of 12. The 1989 NOI, for example, finds that children ages 12–17 have similar radio listening habits to adults and that at times children ages 12–17 listened to the radio in somewhat higher percentages than adults. *1989 NOI*, 4 F.C.C.R. at 8361 ¶ 29; *1990 Report*, 5 F.C.C.R. at 5302–03 ¶¶ 38–49; *1993 Order*, 8 F.C.C.R. at 708–09 ¶¶ 24–27. The Commission cites no data for children under the age of 12, maintaining that "there [is] little quantitative information about the radio listening habits of children under 12 years of age." *1993 Order*, 8 F.C.C.R. at 708 ¶ 25 n.57. If the 6 a.m.-to-midnight ban is meant to protect children under the age of 12, we are puzzled by the government's regulation for the benefit of a radio audience about which it has no information, and are at a loss to understand "how [the government] uses the 12–17 age group figures to reach conclusions about the younger group." *ACT I*, 852 F.2d at 1341–42.

Butler v. Michigan, 352 U.S. 380, 383 (1957)). The government brushes aside this practical objection on the ground that adults have access to indecent material from broadcast sources after midnight and, more generally, from alternative sources "such as audio and video tapes, cable television, wireless cable or subscription satellite television services." *1993 Order*, 8 F.C.C.R. at 709 ¶ 30 (citing *1990 Report*, 5 F.C.C.R. at 5308–09). *See generally id.* at 709–10, ¶¶ 28–34. However, in *ACT II*, *supra*, we struck down a 24–hour ban on indecent broadcasting despite the Commission's assertion that adults had ample "non-broadcast alternative[s]" for receiving indecent material. *See 1990 Report*, 5 F.C.C.R. at 5308 ¶¶ 84–88. The availability of alternative sources of information simply does not relieve the government from considering the First Amendment rights of the broadcast audience.[21]

Candidly, we can locate no evidence in the record that the government has taken the First Amendment interests of adults into account in advancing its compelling interests in the protection of children. The amendment to the Telecommunications Act was offered on the floor of the Senate and was adopted without committee consideration or floor debate, *see* 138 CONG. REC. S7308 (daily ed. June 3, 1992), drawing its facts solely from the FCC's 1990 Report, *see* 138 CONG. REC. S7310 (daily ed. June 2, 1992) (submission by Sen. Helms) (incorporating 1990 Report into legislative record). The 1990 Report, in turn, had been the result of proceedings held in support of the 24–hour ban that had been ordered by Congress. *See ACT II*, 932 F.2d 1504. Therefore, when Congress relied on the 1990 Report, it relied on a rulemaking record that had been an effort "to compile a record in support of Congress' imposition of a 24–hour ban on the broadcast of indecent material." *1989 NOI*, 4 F.C.C.R. at 8361 ¶ 29. The outcome of the FCC's 1993 rulemaking proceedings pursuant to the Telecommunications Act, moreover, was preordained because that rulemaking was limited to updating the Commis-

[21] Indeed, the Commission purports not to rely on the existence of alternative sources "as the sole basis" for its decision. *1993 Order*, 8 F.C.C.R. at 710 ¶ 34 n.89.

sion's record in the 1990 rulemaking. *See 1992 NPRM*, 7 F.C.C.R. at 6465 ¶ 9. As the government frankly admits, the sole operating principle by which Congress determined this particular safe harbor was to find a time when "the risk of children in the broadcast audience would ... be lessened." Respondents' Brief at 7 (quoting 138 CONG. REC. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd)). *See id.* at 11 ("[A] more extensive safe harbor would undermine the goals of protecting children because there are significant numbers of children in the audience at other times ...."). This exclusive focus on the number of children in the audience indicates that the government wholly failed to balance its child-oriented compelling interests against the countervailing First Amendment rights of adult listeners and viewers.[22] What it should have been aiming at was a time when the risk of child viewing was low and yet adult viewers could exercise a meaningful choice to view the material while still awake.[23]

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[22] The government's rationale in arriving at the 6 a.m.-to-midnight ban would equally support the imposition of a 24-hour ban on "indecent" material. The 1993 Order states: "In our 1990 Report ... we examined data that showed that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day and night.... We find that our earlier conclusion remains true." *1993 Order*, 8 F.C.C.R. at 707 ¶ 20. In the 1990 Report the Commission had concluded that the 24-hour ban was warranted by the audience data and did not unconstitutionally restrict adults' viewing and listening. 5 F.C.C.R. at 5308 ¶ 86.

[23] Similarly, the decision to grant public broadcasting stations an additional two hours (between 10 p.m. and midnight) during which to broadcast indecent material appears problematic as well. Economic considerations inhibiting broadcasting stations from remaining on the air after midnight would appear to apply to commercial as well as public broadcasters. Moreover, the Commission has not explained why the availability of indecent material on some stations does not defeat its overall purpose of limiting children's exposure to indecent material. While we need not reach the constitutionality of the exception for public broadcasting stations that go off the air

IV. Conclusion

In *ACT I*, we held that the FCC had not adequately justified its administrative decision to impose a 6 a.m.-to-midnight ban on the broadcasting of "indecent" material. 852 F.2d 1332. Congress subsequently ordered a 24-hour ban on "indecent" material. In *ACT II*, we held the 24-hour ban unconstitutional and remanded the case to the FCC with the same directions as in *ACT I*, to redetermine the proper safe harbor after a full and fair hearing. *ACT II*, 932 F.2d at 1510. Once again Congress intervened, now enacting into law the original FCC-imposed 6 a.m.-to-midnight ban, in order (i) to protect the privacy of every American's home, (ii) to help parents supervise their children's listening and viewing, and (iii) independently to shield minors from "indecent" material. The government has not demonstrated to this court the compelling nature of any interest in suppressing constitutionally protected material in order to protect an abstract privacy of the home at the expense of First Amendment rights of its inhabitants. We do recognize, however, the compelling nature of the government's interest in helping parents supervise their children and in independently protecting the well-being of its youth. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince*, 321 U.S. at 168. Nevertheless, restrictions on First Amendment rights, even when imposed in the best interest of children, must still be narrowly tailored and no more burdensome than necessary to advance the protective goal. The boundaries of the 6 a.m.-to-midnight ban were arrived at solely on the basis of a judgment that fewer children are in the broadcast audience between the hours of midnight and 6 a.m. than at other times. That might even more assuredly have been said for a 1:00 a.m.-to-5:00 a.m. or 3:00 a.m.-to-4:00 a.m. safe harbor; no such one-dimensional analysis takes account of the First Amendment interests of older minors and adult viewers in receiving constitutionally protected material. Our system of government demands more precision when rights protected by the First Amendment are curtailed.

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before midnight, any such special treatment in the future must be adequately explained.

We conclude that the government has not tailored its 6 a.m.-to-midnight ban on constitutionally protected speech narrowly so as to advance the asserted interests without unnecessary abridgment of First Amendment rights. Accordingly we vacate the FCC's 1993 Order, and hold section 16(a) of the Public Telecommunications Act of 1992 unconstitutional.

Once again the curtain falls and the FCC finds itself roughly in the same position that it occupied at the close of *ACT I*. The FCC's 1987 Reconsideration Order was neither vacated by this court in *ACT I*, nor retracted by the Commission. Thus, the Commission's declared intention to broaden enforcement of § 1464 beyond situations like the mid-day "Filthy Words" scenario approved by the Supreme Court in *Pacifica* still remains. *See Reconsideration Order*, 3 F.C.C.R. 930. We held in *ACT I* that this broader approach to enforcement of § 1464 required the Commission to "[ ]determin[e], after a full and fair hearing, ... the times at which indecent material may be broadcast." *ACT I*, 852 F.2d at 1344. Relying on repeated congressional intervention, the subsequent record compiled by the FCC in the 1989–90 and 1992–93 rulemaking proceedings did not seek to address our concerns raised in *ACT I*. As in *ACT II*, however, we find the intervening statute unconstitutional. Therefore, should the Commission maintain its intention to broaden the enforcement of § 1464, we must, once again, direct the Commission to take its administrative task to " 'redetermin[e], after a full and fair hearing, ... the times at which indecent material may be broadcast,' [and] to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of 'children' and 'reasonable risk' [of exposure of children to indecent material] for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts." *ACT II*, 932 F.2d at 1510 (citing *ACT I*, 852 F.2d at 1341–44).

It is so ordered.

EDWARDS, *Circuit Judge*, concurring specially in the reversal: I concur in the judgment to reverse, and I agree with much of what is said in the majority opinion. I write separately, however, to express my views on several matters that I find particularly troubling.

Initially, it is worth noting petitioners' renewed challenge to the constitutionality of the generic definition of indecency adopted by the Federal Communications Commission ("FCC" or "Commission"). This court twice has rejected unequivocally the contention that the definition is so vague as to violate the First Amendment. *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*"), *cert. denied*, 112 S. Ct. 1281 (1992); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338–39 (D.C. Cir. 1988) ("*ACT I*"). In *ACT I*, we read *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), implicitly to hold that the FCC's definition of indecency was not unconstitutionally vague, based on the fact that the Supreme Court both quoted elements of the definition with seeming approval and affirmed the Commission's sanction of a radio broadcast whose content ran afoul of the definition. 852 F.2d at 1338–39. Although in *ACT I* we invited correction from "Higher Authority" in the event we had misread *Pacifica*, no such correction has issued. Accordingly, we are precluded by our holdings in *ACT I* and *ACT II* from revisiting the question of vagueness.

This case requires us to address an issue not posed in *ACT I* or *ACT II*. Here, in addition to asserting an interest in facilitating parental supervision of their children, the Government further claims an "independent" interest in shielding children from exposure to indecent programming. In my view, these two interests, at least as the Government seems to define their scope, are irreconcilably in conflict. In *ACT I*, the Government made clear that its interest in facilitating parental supervision presupposed a significant measure of parental autonomy; that is, the FCC "[did] not propose to act *in loco parentis* to deny children's access [to indecent programming] *contrary to* parents' wishes." *ACT I*, 852 F.2d at 1343 (emphasis in original). Rather, the Government sought only to assist parents " 'to decide effectively what material of

this kind their children will see or hear.'" *Id.* at 1343–44 (quoting *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad.Reg.2d (P & F) 211, 215 para. 11 (1987)). Approving this interest, we directed the FCC to "determine what channeling rule will most effectively promote parental—as distinguished from government—control." *Id.* at 1344.

In this case, however, the Government appears to take the position that its "independent" interest in protecting children's well-being operates without regard either to parental wishes or to the availability of parental supervision.* This being so, it is hard to comprehend how the Government's "independent" interest does not render superfluous its supposed interest in facilitating parental supervision, even though the FCC explicitly reaffirms the latter. At oral argument, when pressed, the FCC's counsel was unable to explain how these two interests mesh. The FCC's failure to reconcile the interests on which it purports to rely is but one glaring example of the agency's failure to justify the instant regulation.

I do not mean to say, however, that I doubt that the Government may have a compelling interest in the well-being of children or that there are many situations, in the First Amendment context and otherwise, in which that interest amply will support Government intervention of various sorts. For example, one sees daily illustrations of such intervention in the family divisions of state courts. In the family court context, however, Government regulation contrary to parental preferences and authority generally is a response to significant breakdowns within the family unit or to the complete

* Indeed, the FCC concludes that "parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching and listening [to] at all times." *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704, 710 ¶ 36 (1993) ("*1993 Order*"), *reprinted in* J.A. 79, 85. This high threshold virtually insures that the FCC can deem many parents incapable of supervising their children, thereby setting the stage for Government usurpation of the parental role.

absence of parental caretaking. Society protects children who are abused, neglected or abandoned, because the harm suffered is easily proven and no parent has a right to hurt a child in these ways. Indeed, such actions are contrary to the notion of "parenting," so they are not excused when a parent is the culprit.

The instant regulation, however, applies far more broadly and is not premised on such discernible harms. Rather, it seems to rest on vague notions that too many parents are either unavailable to supervise their children or inept at the task of parenting, at least insofar as the Government sees it. There are two problems with these views.

First, in effectively setting itself up as the final arbiter of what American children may see and hear, the Government tramples heedlessly on parents' rights to rear their children as they see fit and to inculcate in them moral values of the parents' choosing. *See Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972) (exempting children of Amish faith from compulsory school attendance on grounds that secondary education teachings "are in marked variance with Amish values and the Amish way of life"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (noting that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of society" and of constitutional magnitude). This countervailing interest is not grounded solely in the First Amendment. As at least one scholar has persuasively posited, this parental interest also derives from our constitutional vision of liberty and the role of the individual in a true democracy. "Free people require 'private realms' in which they can develop differently. The child must not be the creature of the state, but must be 'conceived in liberty' and nurtured in contexts sheltered from homogenizing control." Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299, 392–93 (1993) (footnote omitted).

Second, in acting to limit children's exposure to indecent material, the Government's stated purposes rest on inconsistent, confused and possibly false premises. Many persons in

society (and I am such a person) suppose that there must be ill effects from exposing children (especially young ones) to "indecent" material; but the truth of the matter is that we have yet to unearth those ill effects with any precision, and we have yet to understand whether the effects are measurably different when parents are available and willing to "supervise" their children. Indeed, "parental supervision" itself is a vague notion, for we surely cannot assume that all parents will act in some uniform way in "supervising" their children. When acting consciously, some parents might prohibit their children from any exposure to indecent material; some might modify a prohibition depending upon the nature of the material and the age of the child; still others might view or listen to indecent material with their children, either to criticize, endorse or remain neutral about what they see or hear (and these responses might vary depending upon the age of the child and family values). Thus, if facilitation of "parental supervision" is the principal interest to be served, then a good argument can be made that ensuring the availability of "blocking" devices—to *permit* parents to block their children from seeing and hearing indecent material in their absence—is the most that Government ought to do. For the interest of facilitating parental control assumes that parents are entitled to do as they prefer.

If, however, the interest to be served is the protection of children, without regard to their parents' preferences, then it seems to me that the issue is quite complicated. A principal problem is that we do not appear to know how the exposure to indecent (as opposed to violent) material affects children, either with respect to their senses of self-worth, their senses of respect for members of the opposite sex, or their behavior patterns as functioning members of society. Thus, to highlight the issue, suppose that we knew for sure that most parents would prefer to retain the right to decide whether and on what terms to allow their children to be exposed to indecent material: could Congress still ban the showing of indecent material? If so, on what terms? Would it be prompted by a "*moral judgment*" that indecent material is bad for all children of all ages? And, if so, how can that be

squared with the Supreme Court's rulings that distinguish between unprotected "obscene" and protected "indecent" materials, and suggest that the ages of minors must be considered in assessing the vulnerability of children? Or, rather, would it be premised on a purpose to *save children from harm*? If so, what is the nature of the harm, how does it manifest itself, and are children of all ages affected in the same way? Alternatively, would the action be designed to *protect society from harm* that can come from children who have been exposed to indecent material (or from adults who were exposed when they were minors)? If so, what is the nature of that harm and how pervasive is it?

In short, it seems to me that the strength of the Government's interest in shielding children from exposure to indecent programming is tied directly to the magnitude of the harms sought to be prevented. On the record before us, however, I have difficulty discerning precisely what those harms are. In the *1993 Order*, the FCC asserts only that "harm to children from exposure to [indecent] material may be presumed as a matter of law" and adverts to the existence of studies demonstrating certain undefined "negative effects of television on young viewers' sexual development and behavior." 8 F.C.C.R. at 706–07 ¶¶ 17–18. This does not provide a very secure basis on which to anchor significant First Amendment intrusions. The apparent lack of specific evidence of harms from indecent programming stands in direct contrast, for example, to the evidence of harm caused by violent programming—a genre that, as yet, has gone virtually unregulated. *See generally* Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where To Go From Here*, 267 JAMA 3059 (1992) (recounting results of several studies demonstrating that prolonged childhood exposure to television violence correlates with increased levels of physical aggressiveness and violence).

In sum, on the record before us, it is quite clear that the Commission has failed in several significant respects to justify the broad restriction at hand. Thus, neither section 16(a) of the Telecommunications Act nor its implementing regulations can be upheld.

Finally, I wish to state my understanding of our ultimate resolution of this case. Although we find the 6 a.m.-to-midnight indecency ban unconstitutional, I do not understand the majority to hold the Commission obliged to continue with its efforts to regulate indecent programming. Six years and two statutory interventions after the Commission originally announced its intention to broaden enforcement of 18 U.S.C. § 1464, it is not for this court to assume that the FCC's regulatory agenda has remained static. Moreover, should the Commission choose to go forward, I do not believe it within our authority to order the agency to proceed in any specific administrative fashion, absent some statutory directive. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543–44 (1978).

In *ACT I*, we ordered the Commission to hold hearings in order to resolve two pending enforcement actions. In this case, however, no enforcement actions are pending. Furthermore, we now readily acknowledge that repeated congressional intervention has prevented the Commission from carrying out its original intention of acting on its own to broaden enforcement of 18 U.S.C. § 1464. I discern no "constitutional constraints or extremely compelling circumstances" that would otherwise empower this court to cabin the Commission's lawful discretion or compel it to act other than as Congress requires. *Vermont Yankee*, 435 U.S. at 543. In other words, there is no legal requirement that the FCC pursue this matter further by "full and fair hearing." Under *Vermont Yankee*, the Commission is free to proceed by any lawful administrative means *it* deems appropriate.

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-223

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency in
18 U.S.C. § 1464

REPORT AND ORDER

Adopted: January 19, 1993 Released: January 22, 1993

By the Commission:

I. INTRODUCTION

1. In this *Report and Order* we adopt regulations to establish the times of day during which indecent programming may not be broadcast on radio and television stations. We take this action pursuant to Section 16(a) of the Public Telecommunications Act of 1992, which states:

> The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming --
>
> > (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcast station not described in paragraph (1).[1]

The regulations required under this provision "shall become final not later than 180 days after the date of enactment of this Act," *i.e.*, by February 22, 1993.[2]

2. On October 5, 1992, we released a *Notice of Proposed Rule Making*,[3] which invited interested parties to comment on proposed rules drafted in accordance with Section 16(a) and 18 U.S.C. § 1464, the principal statute governing obscene and indecent broadcasts. We also asked commenters to update the record in connection with the presence of children in the viewing and listening audience as it relates to the government's interest in restricting the broadcasting of indecent material.

3. By this *Report and Order*, Section 73.3999 of the Commission's Rules is amended[4] to: (a) prohibit obscene broadcasts at all times; (b) prohibit the broadcast of indecent material between the hours of 6 a.m. and 10 p.m. on public broadcast stations[5] that go off the air at or before 12

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[1] Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992) ("Section 16(a)"), enacted August 26, 1992.

[2] *Id.*

[3] 7 FCC Rcd 6464 (1992) ("*Notice*").

[4] *See* Appendix A.

[5] For purposes of implementing Section 16(a), we define "public broadcast station" as it is defined in Section 397(6) of the

midnight; and (c) prohibit the broadcast of indecent programming on all other broadcast stations between 6 a.m. and 12 midnight.

II. BACKGROUND

4. The history of regulation of broadcast indecency has been set forth many times in recent years and need not be detailed here.[6] For present purposes, it is sufficient to note that, although the Supreme Court has upheld the Commission's authority to regulate broadcast indecency,[7] some aspects of our enforcement program have been under challenge since 1987 when we broadened our enforcement policies.[8] On review of that action, the D.C. Circuit in *Action for Children's Television* v. *FCC ("ACT I")*,[9] upheld our use of a generic definition of indecency[10] and affirmed our warning in one case that involved the daytime broadcast

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Communications Act of 1934, as amended, 47 U.S.C. § 397(6).

[6] *See, e.g., Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1506-07 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct 1282 (1992) (*"ACT II"*).

[7] *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*"Pacifica"*).

[8] *See Infinity Broadcasting Corp. of Pa. (WYSP(FM))*, 2 FCC Rcd 2705 (1987); *Pacifica Radio (KPFK-FM)*, 2 FCC Rcd 2698 (1987); and *The Regents of the University of California (KCSB-FM)*, 2 FCC Rcd 2703 (1987), *on recon. sub nom. Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd 930 (1987) *("Infinity Reconsideration")*.

[9] 852 F.2d 1332 (D.C. Cir. 1988).

[10] The Commission defines broadcast indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

of indecent material. However, the court remanded the case insofar as we had taken action against evening broadcasts aired after 10 p.m. The court directed us to conduct a "full and fair hearing" to determine the times of day when indecent material may be broadcast.[11]

5. Before we could act on the *ACT I* remand, Congress directed us to enforce the statutory restriction on broadcast indecency on a 24-hour per day basis. Shortly thereafter, we adopted a new rule establishing a 24-hour enforcement program.[12] That enforcement program never went into effect, however, because the court stayed and later vacated it in *ACT II*.[13]

6. While the *ACT II* case was pending before the court, and in light of a Supreme Court decision regarding "dial-a-porn" services,[14] we asked to have the case remanded to conduct further proceedings on the constitutionality of 24-hour broadcast indecency enforcement. Upon remand, we commenced a comprehensive proceeding seeking comment on many of the issues raised earlier by the court in *ACT I*, such as: (a) the definition of "children" for determining what age group is relevant in regulating broadcast indecency; (b) children's access to broadcast media and their actual listening and viewing habits to assess the risk of exposure to indecent material; (c) alternatives to 24-hour enforcement, such as

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[11] *Id.* at 1344.

[12] *See Order*, 4 FCC Rcd 457 (1988).

[13] 932 F.2d 1504.

[14] In *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115 (1989), the Court upheld a complete ban on obscene telephone messages, but invalidated a statutory prohibition on indecent messages.

channeling, program ratings, warnings, and broadcast technologies that could restrict children's access; and (d) the availability of non-broadcast alternatives for indecent materials.[15]

7. After receiving over 92,500 formal and informal submissions, we issued a report concluding that a 24-hour enforcement program appeared to be the most narrowly tailored means of effectively promoting the government's compelling interest in protecting children from broadcast indecency because, *inter alia*, there is a reasonable risk that a significant number of children are in the broadcast audience at all times of the day and night.[16]

8. In May 1991, without directly addressing our findings in the *1990 Report*, the D.C. Circuit in *ACT II* invalidated the 24-hour enforcement program as inconsistent with the holding in *ACT I*.[17] The court directed the Commission to "redetermin[e], after a full and fair hearing, . . . the times at which indecent material may be broadcast, and to "carefully review and address the concerns . . . raised in *ACT I*: among them, the appropriate definitions of 'children' and 'reasonable risk' for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in

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[15] *Notice of Inquiry* in MM Docket No. 89-494, 4 FCC Rcd 8358 (1989) *("1989 NOI")*.

[16] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd 5297 (1990) *("1990 Report")*.

[17] *ACT II*, 932 F.2d at 1508-09.

regulating indecent broadcasts."[18] In response to the court's action striking down the 24-hour statute, Congress enacted the legislation we implement today.[19] In the discussion that follows, we respond to the issues which have been identified by the commenters and the courts that are relevant to this proceeding.[20]

III. DISCUSSION

A. Regulation of Broadcast Indecency

9. Several parties in this proceeding have argued that the scope of the government's interest in regulating broadcast indecency is very narrow, that we have yet to justify our classification of "children" as those age 17 years and under, and that there is no evidence demonstrating that indecent broadcasts harm children. We will address each of these related issues in turn.

1. Scope of the Interest

10. The overriding interest underlying Section 16(a) is the government's compelling interest in protecting children (defined as minors, ages 17 and under) from the harm of exposure to indecent broadcast materials. This interest is not, as some parties have suggested, restricted to ensuring that

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[18] *Id.* at 1510 (citing *ACT I*, 852 F.2d at 1341-44).

[19] *See* 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd).

[20] Parties filing comments in this proceeding (and the references to them used herein) are listed in Appendix B. Morality in Media filed comments after the deadlines established in the *Notice*. We will treat its comments as a permissible *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts, regardless of whether parents choose to exercise that supervision.[21] Rather, it encompasses the government's independent interest in ensuring the well being of minors. This view finds support in both the legislation and the case law pertaining to broadcast indecency.

11. First, there is no suggestion in the language of Section 16(a) that Congress intended merely to foster parents' ability to supervise their children in enacting the new safe harbor.[22] Indeed, the legislative history of Section 16(a) identifies a broader objective. For example, the provision's sponsor, with no mention of parents' ability or opportunity to supervise their children, expressed concern about the powerful influence of broadcasting on the public "particularly on our children" and that "the behavior of these children in the years ahead will reflect the behavior and standards to which television has exposed them in their most vulnerable and malleable years."[23] Another proponent of the measure

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[21] *See* Broadcasters Comments at 11; Infinity Comments at 2 (citing *ACT I*, 852 F.2d at 1343); *see also 1990 Report*, 5 FCC Rcd at 5299, 5310 n. 16, and comments cited therein.

[22] The commenters opposed to the new broadcasting channeling program also focus on the different statutes through which Congress has regulated access to cable indecency and "dial-a-porn" telephone messages to argue that Congress is only concerned about affording parents an opportunity to supervise children's access to indecent material. To the extent that other statutes are relevant, they do not support this narrower interpretation. While facilitating parental supervision may have been chosen by Congress as one means of regulating indecency for those other media, this surely does not indicate that the overall governmental interest in protecting children has been reduced.

[23] 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd).

stated even more directly that "parental supervision is not a cure-all" and that "[p]arents deserve and need the added protection for children which this amendment offers."[24]

12. Second, the government's independent interest in protecting children from indecent material has been specifically recognized by the Supreme Court. In *Pacifica*, the Court reaffirmed its holding in *Ginsberg* v. *New York* that the government's two-fold interest "in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified regulation of otherwise protected expression."[25] More recently, in *Sable*, the Court reiterated that "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."[26]

13. In addition, as noted in our *1990 Report*, we have focused not only on the government's interest in helping parents supervise their children's use of the broadcast media but also on the government's independent interest in protecting children as a basis for regulating broadcast indecency.[27] We cited specific data in the *1990 Report* that

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[24] *Id.* at S7309 (statement of Sen. Helms) (supporting amendment "to protect our children from indecent programs on radio and television. . . .").

[25] *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. 629 (1968)).

[26] *Sable Communications* v. *FCC*, 492 U.S. at 126 (citing *Ginsberg* v. *New York* and *New York* v. *Ferber*, 458 U.S. 747, 756-57 (1982)). *See also ACT I*, 853 F.2d at 1343 n.18 (quoting *New York* v. *Ferber* and *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982)).

[27] *1990 Report*, 5 FCC Rcd at 5300.

showed that the "opportunity for supervision" is not sufficient. We concluded that the pervasiveness and accessibility of the broadcast media, coupled with the lack of effective control mechanisms, make effective parental supervision nearly impossible.[28]

14. Finally, we note that the government's interest is even broader than protecting children. In *Pacifica*, the Supreme Court's first stated rationale for upholding the Commission's indecency action was the right of all members of the public to be free of indecent material in the privacy of their homes. The Court found that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[29] In *Sable*, the Supreme Court again referred to this residential privacy interest, noting the "unique" attributes of broadcasting, i.e., that it "can intrude on the privacy of the home without prior warning as to program content."[30]

2. Definition of "Children"

15. Closely related to the scope of the compelling

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[28] *Id.* at 5305.

[29] 438 U.S. 726, 748 (citing *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970)); *id.* at 759-60 (Powell, J., concurring).

[30] 492 U.S. at 127. *See also 1990 Report*, 5 FCC Rcd at 5300, where we concluded that preserving the privacy of the home provides an alternative basis for upholding the constitutionality of restrictions on indecent broadcasting.

interest in protecting children is the definition of the age group of children broadcast indecency regulation serves to protect. Although we addressed this issue in the *1990 Report*, some of the commenters in this proceeding continue to challenge our conclusion that children 17 and under are properly within the ambit of the government's interest in restricting access to indecent material.[31] As we explained in the *1990 Report*, based on other federal and state statutes dealing with indecent materials, as well as several Supreme Court decisions recognizing the compelling government interest in controlling the availability of indecent material to minors, Congress and the Commission have appropriately sought to protect children age 17 and under.[32]

16. None of the parties in this proceeding has refuted this justification and they present no evidence to counter the findings made in the *1990 Report* that 17 and under is the relevant age group for channeling purposes. Moreover, the sponsor of Section 16(a) on the Senate floor cited approvingly the 17 and under age group along with findings in the *1990 Report*.[33] Accordingly, we understand Congress to have relied on this definition of children in establishing the current channeling regulation. We see no reason to alter our position at this time.

3. Harm to Children

17. Commenters in this proceeding have again attacked the underlying rationale for restricting broadcast indecency on

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[31] *See* Broadcasters Comments at 17; *Pacifica* Comments at 5.

[32] *1990 Report*, 5 FCC Rcd at 5301.

[33] 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd).

the ground that no evidence exists that such programming is harmful to children.[34] However, as we noted in our *1990 Report*, it is well established that harm to children from exposure to such material may be presumed as a matter of law.[35]

18. Moreover, in connection with Section 16(a), one of the amendment's sponsors included in the record several excerpts from studies on the negative effects of television on young viewers' sexual development and behavior.[36] In proscribing the dissemination of indecent material to minors, Congress has considered testimony that cites its harmful effects[37] and has responded not only with statutes restricting indecent broadcasting, but with the passage of other statutes that limit the availability of indecent material to minors through cable television and telephones.[38] Under these

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[34] Broadcasters Comments at 14-15.

[35] 5 FCC Rcd at 5300 (citing *Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring) and *Ginsberg* v. *New York*, 390 U.S. at 641-43); *accord Sable*, 492 U.S. at 126-27.

[36] *See* 138 Cong. Rec. at S7309-10 (June 2, 1992) (statement of Sen. Helms), and studies cited therein.

[37] *See* Telephone Decency Act of 1987, Hearing Before the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives Committee on Energy and Commerce, 100th Cong., 1st Sess. (Serial No. 100-99, Sept. 30, 1987) at pp. 22-26, 27, 63-64, 96-97; Cable-Porn and Dial-A-Porn Control Act, Hearing Before the Subcommittee on Criminal Law of the United States Senate Committee on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985, Serial No. J-99-46) at pp. 103, 135-138.

[38] *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1486 (1992), 47 U.S.C. §

circumstances, we find no merit in the challengers' arguments regarding harm.

B. The Channeling Approach

19. We analyze below the channeling enforcement program required by Section 16(a) in light of the concerns raised by the D.C. Circuit in *ACT I* and *ACT II*. We conclude that the channeling program we implement by this *Report and Order* properly accommodates the various interests of broadcasters, adults and parents. It is a narrowly tailored means of achieving the government's compelling objective of protecting children from exposure to indecent broadcast programming, and thus, in our view, comports with the First Amendment.

1. Children in the Broadcast Audience

20. In the *ACT I* and *ACT II* decisions, the D.C. Circuit indicated its concern that any channeling program regarding broadcast indecency be guided by an assessment of when there is a reasonable risk that children are in the audience. In our *1990 Report* on broadcast indecency, we examined data that showed that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day and night.[39]

532(j) (directing the Commission "to promulgate regulations designed to limit the access of children to indecent programming" on cable television leased access channels); Pub. L. No. 101-166, title V, § 521, 103 Stat. 1192-1193, (1989) 47 U.S.C. § 223(b)(2) (prohibiting providers of indecent telephone communications for commercial purposes from making their services available to persons under age 18).

[39] 5 FCC Rcd at 5301-06.

In enacting Section 16(a), Congress relied on the findings of the *1990 Report*.[40] We now have reexamined the data gathered in MM Docket No. 89-494, as well as additional data supplied by commenters in this rulemaking proceeding, on the presence of children in the viewing and listening audience. We find that our earlier conclusion remains true. And certainly, there is thus a reasonable risk that significant numbers of children ages 17 and under listen to the radio and view television during the enforcement period between the hours of 6 a.m. and 12 midnight.

a. Television

21. The record gathered in MM Docket No. 89-494 confirmed that broadcast television is very accessible to children. We found in MM Docket No. 89-494 that children have access to broadcast television in virtually every household, over 63% of homes have more than one television set, and between 25% and 50% of children have a set for their personal use.[41] As would be expected, most of children's television viewing occurs during the prime time hours of 8 p.m. to 11 p.m. (7 to 11 p.m. on Sundays) -- between 21% and 28% of children's weekly viewing occurs during these hours.[42] Also, a considerable amount of children's total television viewing time takes place after

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[40] *See* 138 Cong. Rec. S7308 (June 2, 1992) (statement of Sen. Byrd) (quoting findings in *1990 Report*); *id.* at S7309-7322 (statement of Sen. Helms) (quoting findings of *1990 Report* and placing *1990 Report* into legislative record).

[41] *1990 Report*, 5 FCC Rcd at 5302; *1989 NOI*, 4 FCC Rcd at 8361. *See also* 38 Cong. Rec. at S7309 (statement of Sen. Helms) (citing 1989 NOI).

[42] *1989 NOI*, 4 FCC Rcd at 8373, Appendix B.

prime time -- between 3% (for ages 2 to 5) and 8% (for ages 12 to 17) of children's weekly viewing occurs between 11 p.m. and 1 a.m.[43]

22. In addition, the record revealed that there is a reasonable risk that a substantial number of children are in the television audience during the enforcement period specified in Section 16(a), and beyond. Several commenters in MM Docket No. 89-494 submitted data which showed that, in five metropolitan areas, the number of children in the viewing audience in the late evening was substantial. For example, in New York City, over 360,000 teens (ages 12 through 17) (24% of all teens) and almost 145,000 younger children (ages 2 through 11) (6% of the total population of younger children) watched television from 11 p.m. to 11:30 p.m., Monday through Friday.[44] On Friday and Saturday nights in New York, over 345,000 teens (23%) and over 95,000 younger children (4%) were watching from 11 p.m. to 11:30 p.m.[45] Salem also provided late-night viewing data for the Washington, D.C., Chicago, Des Moines, and Los Angeles markets, for different months in 1989 and averaged the data for the five markets and projected the national television audience for various post-11 p.m. time frames.[46] For the 11 to 11:30 time period, Salem projected that

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[43] *1990 Report*, 5 FCC Rcd at 5303; *1989 NOI*, 4 FCC Rcd at 8373, Appendix B.

[44] Salem Communications Corp. Reply Comments in MM Docket No. 89-494 at 64 (April 19, 1990) ("Salem Reply"), *reprinted in* 138 Cong. Rec. S7320-22 (June 2, 1992).

[45] Salem Reply at 64.

[46] *Id.* at 62-65 (citing Arbitron Television Market Reports for the five markets).

nationally 21.2% of children ages 12 to 17 (a total of 4,293,848 teens) were watching television. From 11:30 p.m. to 1 a.m. Salem projected that the national average was 3,078,608 teens (15.2%). Salem's data were cited in support of Section 16(a) and included as part of the legislative record.[47]

23. In this rulemaking proceeding, Bonneville International Corporation submitted updated television ratings data in the two markets in which it operates television stations (Salt Lake City and Seattle).[48] According to Bonneville's data for Salt Lake City, an average of almost 28,000 children ages 2 through 17 are watching network-affiliated television stations from 6 a.m. to 10 a.m., Monday through Friday;[49] from 10 p.m. to 1 a.m. an average of 16,800 children are watching; from 10 p.m. to 12 midnight, the audience contains approximately 24,000 children; and from 11 p.m. to 12 midnight there still are at least 10,000 children viewing broadcast television on week nights and 14,000 on Saturday nights.[50] In the Seattle market, an average of 102,200 children are watching broadcast television from 6 a.m. to 8 a.m., Monday through Friday;[51] from 10 p.m. to 12 midnight, an average of 33,000 children are in the television audience; approximately 69,000 are watching at 10:30 p.m.; and Monday through Friday, at least 10,000 children are in the audience at 11:30 p.m., but

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[47] *See* 138 Cong. Rec. at S7320-22.

[48] Bonneville Comments at 6-7 and Exhibits 9-10 (citing Nielson data).

[49] *Id.* at Exhibit 9, p. 1

[50] *Id.* at Exhibit 9, p. 2.

[51] *Id.* at Exhibit 10, p. 1.

on Saturdays, 70,000 children are watching broadcast television at 11:30 p.m.[52] These data show a significant child presence in the television audience during the late evening and early morning hours for these particular markets. This showing, as a sample of children's television viewing patterns in all U.S. markets, supports our conclusion in the *1990 Report* that significant numbers of children are likely to be watching television at all hours, especially from 6 a.m. to 12 midnight. No parties have attempted to directly refute these data or our conclusion.

b. Radio

24. As we determined in the *1990 Report*, radio is even more accessible to children than television with each household having an average of over five radios.[53] Studies cited in MM Docket No. 89-494 also revealed that 65% of children ages 6 to 12 have their own radio and 35% have their own headphone radio.[54] A child's opportunity for unsupervised access to radio was further demonstrated by a study which showed that 80% of the children sampled had a radio in their own bedroom (74% of children in kindergarten through 6th grades, and 88% in 7th through 12th grades).[55] The record in MM Docket No. 89-494 also showed that almost 78% of persons age 12 and over listen to radio for a minimum of five minutes daily, and 96% listen for at least

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[52] *Id.* at Exhibit 10, p. 2.

[53] *1990 Report*, 5 FCC Rcd at 5302. *See 1989 NOI*, 4 FCC Rcd at 8361, *cited in* 138 Cong. Rec. at S7309.

[54] *1989 NOI*, 4 FCC Rcd at 8361.

[55] *Id.*

five minutes weekly. Over 83% of all teenagers listen to radio at least once a day and over 99% at least once a week.[56]

25. The record in MM Docket No. 89-494 indicated that a significant number of children were in the radio listening audience at all times of the day and night, with a national average quarter-hour audience of 2,437,000 children ages 12 through 17 listening to the radio between 6 a.m. and 12 midnight (representing 12.0% of the total estimated teen population of 20,254,000) and 716,000 teens (3.5%) listening after midnight.[57] From 7 p.m. to 12 midnight, there was an average quarter-hour audience of 2,677,000 children (13.2%). The average one day "cume" (the estimated number of different persons who listen to radio for a minimum of five minutes within the specified time frame) from 7 p.m. to 12 midnight was 9,244,000 (45.6%). That is, during the 7 p.m. to 12 midnight time-frame on any given day, over 9.2 million different children ages 12 to 17 in the United States listened to the radio for at least five minutes. Even after midnight, the average one day cume showed that 3,533,000 teens (17%) were in the audience.[58] In the morning hours, from 6 a.m. to 10 a.m., 2,442,000 children (12.1%) were listening to radio during the average quarter-hour, and over 10 million children

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[56] *Id.*; see 138 Cong. Rec. at S7309.

[57] *1990 Report*, 5 FCC Rcd at 5302; *1989 NOI*, 4 FCC Rcd at 8375, Appendix B, Table 4 (citing RADAR 38, Fall 1988, Vol. 1 at 1). While listening data for children ages 12 to 17 were available, there was little quantitative information about the radio listening habits of children under 12 years of age. The radio ratings data for teens for the different dayparts from 6 a.m. to 12 midnight are set forth in Appendix C hereto.

[58] *See* Appendix C.

(50.3%) were in the audience for at least five minutes.[59]

26. Commenters in MM Docket No. 89-494 confirmed that a substantial portion of children ages 12 through 17 are in the radio audience.[60] For example, Salem submitted a radio study for Bakersfield, California which showed that 28% of children ages 12 to 17 in that market listen to radio between midnight and 6 a.m.[61] Other commenters provided radio ratings data in various markets confirming that large numbers of 12 to 17 year olds listen to radio at all times of the day and night.[62]

27. In this rulemaking proceeding, no parties have attempted to contradict these data or findings with regard to the presence of children in the nation's radio markets.[63] Bonneville has submitted updated radio audience data for the eight markets in which it operates radio stations showing that significant numbers of children (ages 12 through 17) are present in the radio audience late at night and early in the

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[59] *Id.*

[60] *1990 Report*, 5 FCC Rcd at 5302.

[61] Salem Reply at Exhibit 1.

[62] *See, e.g.*, Bonneville International Corporation Comments in MM Docket No. 89-494 at 6-7; National Religious Broadcasters Reply Comments in MM Docket No. 89-494 at Exhibit 2.

[63] However, a number of parties in MM Docket No. 89-494, in this proceeding and in several indecency enforcement proceedings take issue with our focus on market-wide data, contending that we should look instead to station-specific, program-specific or format-specific audience measurements. This issue is addressed *infra*, ¶ 38.

morning for all markets.[64] For example, in New York, 667,100 teenage children are listening from 10 p.m. to 1 a.m. and 530,400 are listening from 5 a.m. to 8 a.m.[65] At the low end of the scale, in Salt Lake City, 107,600 teenage children are in the radio audience from 10 p.m. to 1 a.m. and there are 98,900 teens listening from 5 a.m. to 8 a.m.[66] This new data confirm our previous findings that, even in the fringe hours of the late evening and early morning, a substantial number of children are in the listening audience.[67]

2. Accommodating Other Interests

28. We believe that a 12 midnight to 6 a.m. safe harbor time period reasonably balances the compelling interest of protecting children from exposure to indecent broadcast

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[64] Bonneville Comments at 5-6 and Exhibits 1-8. Bonneville relied on Arbitron market and station data (spring and summer 1992) for Chicago, Kansas City, Los Angeles, New York, Phoenix, Salt Lake City, San Francisco, and Seattle.

[65] *Id.* at 5 and Exhibit 4.

[66] *Id.* at Exhibit 6.

[67] Pacifica submitted a study which finds that children generally use radio differently than adults and only gradually learn to use radio as a medium. Pacifica Comments at 6-7 and Attachment A. Nothing in this study would cause us to reach a different result here. Comparing how different age groups listen to the radio generally, or to stations with specific formats, does not disprove the fact that there are substantial numbers of children in the listening audience. Even if more adults listen to commercial or public radio, the available evidence shows that children make up a substantial portion of the radio audience. Moreover, despite commenters' challenge, there is no evidence that public stations are inaccessible to children who scan the radio dial, rapidly tuning (or "grazing") through the entire range of channels.

material at all times against the interests of broadcasters and adults. As explained below, this channeling approach is carefully tailored to "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired" and does not "intrud[e] excessively upon the licensee's range of discretion."[68] In addition, although it limits the times of day during which adults wishing to view or listen to indecent material on broadcast television or radio may gain access to such material, the safe harbor regulation does not reduce the adult population to seeing or hearing only what is fit for children.[69] Furthermore, the statute facilitates the supervision of children by their own parents.[70]

a. Broadcasters

29. *Licensee Discretion.* Broadcasters are opposed to the 12 midnight to 6 a.m. safe harbor because they say it effectively deprives broadcasters their freedom to present indecent programs.[71] They claim that since most listeners and viewers are asleep between 12 midnight and 6 a.m.,[72] quality dramatic or satiric programs on mature themes would no longer be economically justifiable if they could be presented only to the small midnight-to-6 a.m. audience. These

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[68] *ACT I*, 852 F.2d at 1343, 1344.

[69] *See Sable*, 492 U.S. at 126-27 (citing *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957)).

[70] *See ACT I*, 852 F.2d at 1343.

[71] Broadcasters Comments at 8-9.

[72] Broadcasters note that, according to ratings data, the audiences for network-affiliated television broadcast stations and for radio stations drops sharply after midnight. *Id.* at 8 n.3.

commenters also believe that broadcasters will be precluded from presenting timely news material if it contains possibly indecent material[73] and renew a request to make news and public affairs programs entirely exempt from indecency enforcement.[74] Pacifica believes that our enforcement policy should be modified to take into account a broadcaster's good faith judgment and to exclude "meritorious programs" from indecency enforcement action.[75]

30. We do not believe that expanding our indecency enforcement to 12 midnight will foreclose all indecent programming or infringe upon a licensee's discretion to present timely news stories or meritorious programming. The commenters' argument assumes that some "quality dramatic or satiric programs on mature themes" or late-breaking news cannot be presented without containing patently offensive depictions or descriptions of sexual or excretory activities or organs. As the plurality of the Court in *Pacifica* noted, "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[76] Moreover, in addition to the safe harbor time period, programmers may present their indecent audio or video fare through multiple alternative media, such as audio and video tapes, cable television, wireless cable or subscription satellite

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[73] Broadcasters cite as an example news coverage of an angry demonstration or a celebrated trial which would lose its immediacy if not broadcast until many hours after the fact. *Id.* at 8.

[74] *Id.* at 8-9 n. 4. *See Infinity Reconsideration,* 3 FCC Rcd at 931.

[75] *Pacifica* Comments at 7-11.

[76] 438 U.S. at 743 n.18.

television services.[77]

31. Furthermore, the suggestion that licensee discretion over news coverage and "meritorious programs" would be infringed by extending the hours during which indecent programs are actionable ignores the recognized importance of "context" in indecency determinations.[78] As we have indicated, the subject matter alone or the use of particular words or phrases does not render material indecent.[79] This argument also disregards the Commission's policy of "giv[ing] weight to reasonable licensee judgments when deciding to impose sanctions in a particular case."[80] Although in exercising its judgment a licensee is always subject to the risk that a complaint could be filed, that a Commission investigation could ensue and that even a forfeiture penalty could be assessed, the licensee is guaranteed the substantive and procedural safeguards of our indecency enforcement policies and, in most circumstances, the statutory right to a trial de novo in U.S. District Court if

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[77] *See 1990 Report*, 5 FCC Rcd at 5308-09.

[78] *See Infinity Reconsideration*, 3 FCC Rcd at 930.

[79] *See, e.g., King Broadcasting Co.*, 5 FCC Rcd 2971 (1990) (dismissing complaint where "[a]lthough the program dealt with sexual issues, the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner or in any way that we would consider patently offensive."). *See also Letter to Mr. Peter Branton*, 6 FCC Rcd 610 (1991), *appeal pending*, No. 91-1115 (D.C. Cir. oral argument held September 9, 1992) (dismissing complaint against bona fide news broadcast and stating: "No terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances.").

[80] *See ACT I*, 852 F.2d at 1340 n.14; 47 U.S.C. § 503(b)(2)(D).

it so desires.[81]

32. *Notice*. The benefit of articulating the 12 midnight to 6 a.m. channeling approach as part of our indecency enforcement policy is that it presents "a clearly-stated position enabling broadcasters to comprehend what is expected of them and to conform their conduct to the legal requirement."[82] Section 16(a) eliminates the uncertainty of when (possibly) indecent material can be safely aired. Any further uncertainty as to whether a particular broadcast would be deemed actionable indecency can be minimized by a licensee's examination of how we have applied our generic definition of indecency in past enforcement actions. Moreover, licensees are aware that no language or material is per se indecent and that any remaining question as to whether a certain broadcast would be subject to possible sanctions will be ultimately resolved by the Commission on a case-by-case basis when we consider, *inter alia*, the context in which the possibly indecent material was broadcast and reasonable licensee judgments. If, in the licensee's judgment, the material may be deemed actionable indecency under our definition and precedents, the licensee may choose to air it during the safe harbor or exercise other editorial discretion over the material's form and content.

33. *Accommodating Public Broadcasters*. Section 16(a) provides a limited exception to the 12 midnight to 6 a.m. prohibition on indecent broadcasts. "In order to accommodate public television and radio stations that go off the air at or before 12 midnight, the FCC's enforcement authority would

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[81] *See* 47 U.S.C. § 504.

[82] *ACT I*, 852 F.2d at 1344.

extend [to] the hour of 10 o'clock p.m. for those stations."[83] In balancing the interests at stake, it appears reasonable to afford public broadcasters that do not operate during the regular safe harbor time period at least some opportunity to air indecent material as opposed to forcing them to extend their broadcast day beyond that which is economically feasible. Congress carved out this exception apparently as a kind of "rough accommodation" of its concerns for public broadcasters.[84] Congress is entitled to make such judgments so long as it does not place obstacles in the path of a person's exercise of freedom of speech.[85] In this case, the choice to provide a special accommodation for a number of public broadcasters[86] is not unreasonable. Moreover, we note that public stations operate on limited budgets.

b. Adult Listeners and Viewers

34. The safe harbor regulations we adopt today do not reduce the adult population to seeing or hearing only what is fit for children.[87] Through Section 16(a) Congress has affirmatively decided that adults may gain access to indecent material broadcast after 12 midnight, when it believes "the

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[83] 138 Cong. Rec. at S7308 (statement of Sen. Byrd).

[84] *Compare Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

[85] *See Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983).

[86] In their comments, Broadcasters note that a majority of public television stations go off the air by midnight and that at least one quarter of public radio stations end their broadcast day at or before midnight. Broadcasters Comments at 18 n.13.

[87] *See Sable*, 492 U.S. at 126-27.

risk of children in the audience would at least be lessened."[88] Moreover, as we demonstrated in the *1990 Report*, indecent material is available on media that are largely indistinguishable, from the viewer's perspective, from broadcast television, although their characteristics facilitate limiting access only to consenting adults.[89] Accordingly, we do not believe that the regulations we adopt today impermissibly infringe on adults' First Amendment rights.

c. Parents

35. The 12 midnight to 6 a.m. channeling scheme also accommodates the interests of parents, who are entitled to decide whether their children should be exposed to indecent materials. On the one hand, parents who allow their children to have access to such material may choose to do so through other less pervasive media or by permitting them to use the broadcast media during the safe harbor hours. On the other hand, however, the restriction on indecent broadcasts accommodates the interests of parents who wish to limit their children's access to indecent broadcasts.

36. The record in MM Docket No. 89-494 revealed that the pervasiveness and accessibility of television and radio, coupled with the lack of effective parental control mechanisms, make parental supervision exceedingly difficult

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[88] 138 Cong. Rec. at S7308 (statement of Sen. Byrd).

[89] *1990 Report*, 5 FCC Rcd at 5308. While we do not rely on this fact as the sole basis for our conclusion that the balancing of interests directed by Congress is reasonable, we believe, as the Supreme Court noted in *Pacifica*, that availability of such materials through other sources is a factor to be considered. *See Pacifica*, 438 U.S. at 750 n.28; *id.* at 760 (Powell, J., concurring).

if not impossible for the average parent.[90] The record also showed that parents' control of children's television viewing and radio listening differs from parental control of cable viewing and telephone calls.[91] Technical means are readily available to block children's access to indecent cable programs and indecent telephone calls. By contrast, parents cannot rely on technical devices to prevent children from viewing indecent programs on broadcast radio and television. We thus concluded that parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching and listening at all times.[92] However, many concerned parents filing comments in the previous proceeding emphasized that it is not practical for parents to exercise this type of control during all times of the day. While our concerns in this regard have not diminished, as we have explained, in light of the serious constitutional issues at stake here and the need to balance all interests, we conclude that the channeling approach to broadcast indecency enforcement directed by Section 16(a) is reasonable.

3. Defense to Commission Action

37. In the *1990 Report*, we indicated that in enforcing a 24-hour ban on indecent broadcasts we would consider, on a case-by-case basis, evidence from a station charged with indecent broadcasting that there was no actual risk that children were in the broadcast audience in the station's

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[90] *1990 Report*, 5 FCC Rcd at 5305.

[91] *Id.*

[92] *Id.*

market at the time of the broadcast in question.[93] We tentatively conclude that we will continue to afford broadcasters this defense along with the 12 midnight to 6 a.m. safe harbor. We believe that the submission of market-wide data demonstrating that there is no appreciable child audience during the relevant time period would raise a viable defense to a charge of indecency outside of the safe harbor.

38. We note, however, that in several instances, parties have responded to Letters of Inquiry or Notices of Apparent Liability with data which, they argue, demonstrate that few or no children were likely to have been listening to their particular station or program when the alleged indecent material was aired.[94] We indicated in the *1990 Report* that such data is not instructive because it does not account for children's grazing.[95] Thus, until we have been presented with convincing factual evidence showing that program- or station-specific data is relevant in view of the grazing problem, we continue to believe that showings relying on such data would be inadequate as defenses.

IV. Procedural Matters and Conclusion

A. Request for Stay

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[93] *Id.* at 5309.

[94] *See, e.g., Sagittarius Broadcasting Corp.*, 7 FCC Rcd 6873, 6875-76 (M.Med.Bur. 1992).

[95] 5 FCC Rcd at 5309. The practice of random tuning behavior, by which listeners and viewers use the radio or television dial, or a remote control device, to rapidly tune through the entire channel menu in a short period of time, is known as "grazing." Such rapid tuning may not be reflected in a station's or program's ratings data. *Id.* at 5307.

39. In their comments, Broadcasters have requested a broad stay of the Commission's indecency enforcement activities pending judicial review of the new, statutorily mandated "safe harbor" regulations. Specifically, these commenters seek a stay that maintains the present 8 p.m. to 6 a.m. safe harbor. In addition, they would have the Commission suspend indecency enforcement action against "programs with no appreciable child audience" even if aired outside the current safe harbor.

40. The general factors to be considered in deciding whether to stay an action are: (1) whether the petitioner is likely to prevail on the merits of its appeal; (2) whether, without such relief, the petitioner will be irreparably injured; (3) whether issuance of a stay would harm other parties interested in the proceeding; and (4) whether such relief is in the public interest.[96] In this case, Broadcasters have not pleaded these factors and, in our view, their reasons for granting a stay have no merit. Moreover, Congress has directed that the regulations required under Section 16(a) shall become final not later than February 22, 1993. Under these circumstances, Broadcasters' stay request is denied.

B. Final Regulatory Flexibility Analysis

41. *Need and purpose of this action.* The regulations adopted by this *Report and Order* are required by Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992). As directed by this statute, the Commission has adopted regulations that establish the times of day during which indecent

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[96] *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

programming may not be broadcast on radio and television stations.

42. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis.* No comments were filed in response to the Initial Regulatory Flexibility Analysis.

43. *Significant Alternatives Considered and Rejected.* We have found that the broadcast indecency channeling program adopted by this *Report and Order* most effectively serves the compelling interest of protecting children from exposure to indecent broadcast material without intruding excessively on the rights of those entitled to present or receive such material. We therefore believe that the means chosen is the least restrictive available for the broadcast medium and that other alternatives cannot effectively further this interest.

C. Ordering Clauses

44. Accordingly, IT IS ORDERED That the comments filed by Morality in Media ARE ACCEPTED as a permissible *ex parte* presentation.

45. IT IS FURTHER ORDERED THAT the stay requested by Broadcasters IS DENIED.

46. IT IS FURTHER ORDERED That, pursuant to Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992), and Sections 4(i) and (j), 303 and 312 of the Communications Act of 1934, as amended, (47 U.S.C. §§ 154(i) and (j), 303, 312), Section 73.3999 of the Commission's Rules (47 C.F.R. § 73.3999) IS AMENDED, as set forth in Appendix A, EFFECTIVE 30 DAYS from the date of publication in the

Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A -- AMENDATORY TEXT

Part 73, Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73 -- RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 73.3999 is revised to read as follows:

§ 73.3999 Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a public broadcast station, as defined in 47 U.S.C. 397(6), that goes off the air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

(c) No licensee of a radio or television broadcast

station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.

APPENDIX B -- Commenters

Comments

The following parties filed comments on November 6, 1992:

Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Capital Cities/ABC, Inc, CBS, Inc., Fox Television Stations, Inc., Greater Media, Inc., Infinity Broadcasting Corporation, Motion Picture Corporation of America, Inc., National Association of Broadcasters, National Broadcasting Co., Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists ("Broadcasters").

Bonneville International Corporation ("Bonneville").

Infinity Broadcasting Corporation ("Infinity").

The Pacifica Foundation, National Federation of Community Broadcasters, American Public Radio, National Association of College Broadcasters, and PEN American Center ("Pacifica").

Other Submissions

Letter from Jill K. Ferlita, received October 22, 1992.

Letter from Americom Broadcasting, received November 9, 1992.

Morality in Media Comments, received December 4, 1992.

Reply Comments

No reply comments were filed.

APPENDIX C
Radio Ratings Data in MM Docket No. 89-494

Audience Estimates for All Radio Stations by Selected Daypart

Estimated total population of children (ages 12-17): 20,254,000

6 a.m. to 12 midnight	Children (12-17)	Percentage of All Children	Total Persons(12+)	Children as % of Total Aud.
Average quarter-hour	2,437,000	12.0	29,573,000	8.2
Average one day cume	16,638,000	82.2	151,622,000	11.0
Seven day weekly cume	20,145,000	99.5	190,105,000	10.6
6 a.m. to 10 a.m.				
Average quarter-hour	2,442,000	12.1	38,454,000	6.4
Average one day cume	10,190,000	50.3	107,081,000	9.5
Seven day weekly cume	18,301,000	90.4	173,118,000	10.6
10 a.m. to 3 p.m.				
Average quarter-hour	1,891,000	9.3	35,595,000	5.3
Average one day cume	7,072,000	34.9	85,405,000	8.3
Seven day weekly cume	17,318,000	85.5	167,369,000	10.3
3 p.m. to 7 p.m.				
Average quarter-hour	2,815,000	13.9	30,191,000	9.3
Average one day cume	9,195,000	45.4	86,105,000	10.7
Seven day weekly cume	18,427,000	91.0	164,441,000	11.2
7 p.m. to 12 midnight				
Average quarter-hour	2,677,000	13.2	15,949,000	16.7
Average one day cume	9,244,000	45.6	54,850,000	16.9
Seven day weekly cume	17,923,000	88.5	130,550,000	13.7
12:00 midnight to 6:00 a.m.				
Average quarter-hour	716,000	3.5	6,960,000	10.3
Average one day cume	3,533,000	17.4	35,432,000	10.0
Seven day weekly cume	10,896,000	53.8	86,313,000	12.6

Source: RADAR 38, Fall 1988, Vol. 1 at 1, filed in MM Docket No. 89-494, January 26, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-223

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency in
18 U.S.C. § 1464

NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1992; Released: October 5, 1992

Comment Date: November 6, 1992
Reply Comment Date: November 23, 1992

By the Commission: Commissioners Marshall and Duggan issuing separate statements.

1. On August 26, 1992, the President signed into law the Public Telecommunications Act of 1991, Pub. L. No. 102-356, which generally concerns the authorization of appropriations for the Corporation for Public Broadcasting. Section 16(a) of the Act contains the following provision:

> The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming --

> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcast station not described in paragraph (1).

Id. § 16(a). The provision further states that the regulations required under this subsection shall be promulgated in accordance with Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and shall become final not later than 180 days after the date of enactment of the Act. *Id.*

2. In conformity with the statute, we propose to adopt the rule set forth in Appendix A, which will prohibit the broadcast of indecent material between the hours of 6 a.m. and 10 p.m. on public broadcast stations[1] that go off the air at or before 12 midnight, and which will prohibit the broadcast of indecent programming on all other broadcast stations between 6 a.m. and 12 midnight. The rule will prohibit obscene broadcasts at all times. In addition, we invite interested parties to update the record on the presence of children in the viewing and listening audience.

3. By way of background, under 18 U.S.C. § 1464, it is unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." The Commission is empowered to enforce Section 1464 in administrative proceedings by, for example, assessing

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[1] For purposes of implementing this provision, our rule will define "public broadcast station" as it is defined in Section 397(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 397(6).

monetary forfeitures or, in extreme cases, revoking a station's license. *See* 47 U.S.C. §§ 312(a)-(b), 503(b)(1)(D). Concurrently, Section 326 of the Communications Act prohibits the Commission from engaging in censorship or promulgating regulations "which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326.

4. Unlike obscene speech, which is unprotected by the First Amendment and may thus be banned altogether,[2] the courts have held that broadcast indecency is constitutionally protected, but may be "channeled" to times when there is not a reasonable risk that children may be in the audience. *See generally FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978); *Action for Children's Television* v. *FCC,* 852 F.2d 1332, 1337-1340 (D.C. Cir. 1988) *("ACT I"); Action for Children's Television* v. *FCC,* 932 F.2d 1504, 1507-1508 (D.C. Cir. 1991) (*"ACT II"*), *cert. denied,* 112 S.Ct. 1282 (1992). As a basis for regulating indecency, the Supreme Court has recognized the government's compelling interest in protecting children from exposure to indecent materials. See *Sable Communications* v. *FCC,* 109 S.Ct. at 2836; *FCC* v. *Pacifica Foundation,* 438 U.S. at 749-750, *citing Ginsburg* v. *New York,* 390 U.S. 629 (1968).[3]

5. While the Commission's definition of indecent

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[2] See *Sable Communications of California, Inc.* v. *FCC,* 109 S.Ct. 2829, 2835-2836 (1989); *Miller* v. *California,* 413 U.S. 15 (1973).

[3] In *Pacifica,* the Supreme Court also recognized the interest in protecting an individual's right to be free from indecent material in the privacy of the home. 438 U.S. 726, 748; *see id.* at 759-60 (Powell, J., concurring).

material consistently has been upheld,[4] the United States Court of Appeals for the District of Columbia Circuit has twice invalidated particular enforcement programs.[5] Prior to 1987, the Commission's practice had been generally to withhold sanctions for indecent broadcasts aired after 10 p.m. and preceded by a warning.[6] In 1987, the Commission indicated that "12:00 midnight [was its] current thinking as to when it was reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience."[7] On appeal, the court in *ACT I* ruled that the Commission had not "adequately justified its new, more restrictive channeling approach" and directed the Com-

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[4] The Commission defines broadcast indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. The D.C. Circuit Court of Appeals upheld the Commission's use of this definition of indecency most recently in *ACT II*, 932 F.2d at 1509, relying on its prior decision in *ACT I*, 852 F.2d at 1343, and the Supreme Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. at 749-50. In view of these court decisions, the Commission's definition of indecency remains in effect and its modification is not within the scope of this proceeding.

[5] *ACT I* and *ACT II*, *supra*.

[6] See *Pacifica Radio*, 2 FCC Rcd 2698 (1987), citing *Pacifica Foundation*, 36 FCC 147 (1964), and *Pacifica Foundation*, 56 FCC 2d 94, 99-100 (1975).

[7] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 937 n.47 (1987). In enforcing 18 U.S.C. § 1464, the Commission has considered separately the nature of the material involved -- i.e. whether it is indecent -- and the time a broadcast aired, which is pertinent to whether an indecent broadcast is actionable. *See id.* at 936 n.6; *ACT I* at 1338 n.8.

mission, in view of First Amendment concerns, to adopt "a reasonable safe harbor rule" establishing the times at which indecent material may be aired. 852 F.2d at 1334 and 1343 n.18.

6. Following *ACT I*, but before the Commission could act on remand, Congress enacted a statute requiring the Commission to enforce the provisions of 18 U.S.C. § 1464 "on a 24 hour per day basis." Pub. L. No. 100-459, Tit. VI, § 608, 102 Stat. 2228 (1988). The Commission responded by promulgating a rule providing for such enforcement. *Order*, 4 FCC Rcd 457 (1988). A court-imposed stay and an appeal of the 24-hour indecency prohibition, or less restrictive channeling alternatives, in light of the Supreme Court's intervening decision in *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). *See Notice of Inquiry* in MM Docket No. 89-494, 4 FCC Rcd 8358 (1989).

7. After receiving over 92,500 formal and informal submissions, the Commission issued its *Report* in MM Docket No. 89-494. That report concluded that a 24-hour prohibition on indecent broadcasts is the most narrowly tailored means of effectively promoting the government's compelling interest in protecting children from broadcast indecency because there is a reasonable risk that a significant number of children are in the broadcast audience at all times of day and night. *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd 5297, 5298 (1990) *("1990 Report")*. In particular, the Commission confirmed the general pervasiveness and accessibility of broadcasts to children: television, available in virtually every household, is viewed an average of 26 hours per week by children ages 2 to 17 years old, and up to 50% of children have a TV set for their personal use; radio is even more pervasive, with each household having an average of over

five radios. *Id.* at 5302; *see also Sable*, 109 S.Ct. at 2837; *Pacifica*, 438 U.S. at 748-49. Moreover, the available data on children's listening and viewing habits revealed that a substantial percentage of unsupervised children were in the television and radio audiences at all times, even late at night and early in the morning. *1990 Report*, 5 FCC Rcd at 5302-04.

8. Notwithstanding the Commission's findings, in *ACT II* the court of appeals invalidated the statutory ban on broadcast indecency. The court stated: "[o]ur holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely." 932 F.2d at 1509. The court concluded:

> Our decision today effectively returns the Commission to the position it briefly occupied after *ACT I* and prior to congressional adoption of the [24-hour ban]. The Commission should resume its "plans to initiate a proceeding in response to the concerns raised" in *ACT I* . . . .

ACT II, 932 F.2d at 1510. Collectively, *ACT I* and *ACT II* thus hold that the government may not ban indecent broadcasts altogether. Rather, there must be a time period, when the risk of exposure to children is minimized, during which such broadcasts are permitted.

9. Against this background, Congress enacted the "safe harbor" legislation that is now before us. Congress apparently relied on many of the findings in the Commission's *1990 Report* in establishing the 12 midnight to 6 a.m. channeling approach set out in Section 16(a). See 138

Cong. Rec. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd quoting *1990 Report*); *id.* at S7309-7322 (statement of Sen. Helms placing *1990 Report* into legislative record). In enacting the new channeling scheme, Congress has balanced the competing interests affected by the regulation of broadcast indecency and has determined that a 12 midnight to 6 a.m. safe harbor properly effectuates those interests.[8] The focus of this proceeding is, thus, quite narrow and will be confined to the matter of updating the Commission's record pertaining to the governmental interest in restricting the broadcasting of indecent material. Accordingly, we invite the public to update the data considered in the *1990 Report* with regard to the presence of children[9] in the viewing and listening audience.[10]

10. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted,

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[8] We note that, in order to accommodate the interests of public broadcasters who go off the air at or before 12 midnight, Congress has tailored the statute to afford these broadcasters a limited exception to the 6 a.m. to 12 midnight prohibition.

[9] Based on other federal and state statutes dealing with indecent materials, as well as several Supreme Court decisions recognizing the compelling government interest in controlling the availability of indecent material to minors, the Commission has defined "children" as those age 17 and under. *1990 Report*, 5 FCC Rcd at 5301. The findings in the *1990 Report* were approvingly cited by the sponsor of the legislation on the Senate floor, 138 Cong. Rec. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd), and we therefore understand Congress to have concurred in this definition of children and will use it in evaluating the data supplied in this proceeding.

[10] Since much of the record from that proceeding may be relevant here, we shall also incorporate the record from MM Docket No. 89-494 into the record of this proceeding.

except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. *See* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before November 6, 1992, and reply comments on or before November 23, 1992. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

11. As required by Section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Notice of Proposed Rule Making,* but they must have a separate and distinct heading, designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the IRFA, to the Chief Counsel for Advocacy of the Small

Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

12. Authority for this proceeding is contained in Sections 4(i) and (j), 303 and 312 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 303, 312, and in Section 16(a) of the Public Telecommunications Act of 1991, Pub. L. No. 102-356 (1992).

13. Further information on this proceeding may be obtained by contacting Peter Tenhula, Office of General Counsel, at 202-254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE

The Commission proposes to amend 47 C.F.R. Part 73 as follows:

PART 73 -- RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 73.3999 is revised to read as follows:

§ 73.3999 Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a public broadcast station, as defined in 47 U.S.C. § 397(6), that goes off the air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

(c) No licensee of a radio or television broadcast station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action.

This proceeding is being initiated pursuant to Pub. L. 102-356. Section 16(a) and seeks public comment on the implementation of that statutory provision.

Objectives.

Our goal in this proceeding is to supplement the Commission's record to support the implementation of Congress' enactment of a "Safe harbor" time period for the broadcast of indecent material.

Legal Basis.

Authority for this proposed rule making is contained in Sections 4(i) and (j), 303 and 312 of the Communications

Act of 1934, as amended. 47 U.S.C. §§ 154(i) and (j), 303, 312, and in Section 16(a) of the Public Telecommunications Act of 1991, Pub. L. No. 102-356 (1992).

Reporting, Recordkeeping and other Compliance Requirements.

None.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule.

None.

Description, Potential Impact, and Number of Small Entities Involved.

The rules proposed in this proceeding could effect certain small entities including radio and television broadcasters who choose to air indecent broadcast materials at times which will subject them to enforcement action by the Commission.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

None.

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Enforcement of Prohibitions Against Broadcast Indecency

I am pleased the Commission is moving so swiftly to implement this extension of our indecency enforcement authority which President Bush signed into law just three weeks ago.

By extending our hours of enforcement until midnight, this statute authorizes the Commission to take up the merits of many indecency complaints that it would otherwise have had to dismiss simply because the offending material was aired after 8 p.m. Our previously compiled record, not to mention common sense, leaves little doubt that a significant number of children remain in the nightly listening and viewing audience well beyond 8 p.m.

I look forward to our prompt conclusion of this proceeding and, if necessary, our successful defense of this policy in the courts. In my view, this statute and our proposed rules fully comport with existing judicial interpretations of the First Amendment and, thus, should be expeditiously implemented.

Separate Statement
of
Commissioner Ervin S. Duggan

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. Section 1464 (GC Docket No. 92-223)

Our action today responds to a growing concern of Congress and the public that media programming has become too violent, too sexually explicit, too generally unmoored from widely accepted moral norms. The signs of this concern are easy to find:

* A recent Gallup poll suggests that 64 percent of adults -- up 10 percent from a year ago -- believe that current television and cable programs portray "negative values." The respondents, says Gallup, cite a "preoccupation with sex, excessive violence, cursing and foul language and vulgarity."

* A new TV Guide study observed 1,846 individual acts of violence in just one day of television fare.

* Fox Entertainment Group President Peter Chernin recently told an audience that Vice President Quayle, when he raises the issue of television's moral values (or lack of them), is clearly responding to a "legitimate, genuine concern" felt by millions of Americans about what they see on TV.

I do not think it an exaggeration to say that the public is losing faith in the people who manage and program the media. This loss of faith could be one reason why the broadcast networks are losing audience share, and one reason why family-oriented cable TV channels are earning growing

success.

Because the institutions of government do reflect public opinion, Congress and President Bush have now directed the Commission to establish regulations prohibiting indecent broadcast programming between 6 a.m. and midnight: hours that children can be presumed in the audience in greatest numbers. Although the courts have held that broadcast indecency is constitutionally protected speech, those same courts have stated that it is permissible for the Commission to channel such speech to times when there is less risk that children will be in the audience.

The rules proposed in this proceeding attempt to strike a reasonable balance between the First Amendment rights of broadcasters and the adult audience and the government's compelling interest in protecting young people from indecent broadcasts. I have every reason to believe that the record in this proceeding will demonstrate that children constitute a significant portion of the broadcast audience until midnight, if not later.

I therefore support the steps that we take today. If broadcasters are concerned about the issue of government intervention in their programming decisions, I can suggest a remedy: that they exercise greater self-restraint in response to what Peter Chernin calls a "legitimate, genuine" public concern. Clearly this is a moral and ethical problem, as well as a legal one -- and so the most effective solution, in my judgment, will come not from government action but from the efforts of broadcasters and programmers to act as responsible electronic publishers and editors. If recent opinion polls are any guide, exercising such decent editorial restraint would improve audience ratings at the same time.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1092 **September Term, 1993**

Action for Children's Television, et al.,
Petitioners,

v.

Federal Communications Commission,
United States of America,
Respondents

And Consolidated Case No. 93-1100

PETITIONERS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Respondents' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court in banc, that the suggestion is granted and these cases will be reheard by the court sitting in banc. It is

FURTHER ORDERED, by the court in banc, that the judgment filed herein on November 23, 1993 be, and the same hereby is, vacated.

A future order will govern further proceedings.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY:_____
Robert A. Bonner
Deputy Clerk

Date: February 16, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1092 **September Term, 1994**

Action for Children's Television, et al.,
Petitioners,

v.

Federal Communications Commission and
United States of America,
Respondents

And Consolidated Case No. 93-1100

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Communications Commission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are granted and the cases are remanded with instructions, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:_____
Robert A. Bonner
Deputy Clerk

Date: June 30, 1995

Opinion for the court filed by Circuit Judge Buckley, in which Circuit Judges Silberman, Williams, Ginsburg, Sentelle, Henderson and Randolph Concur.

Dissenting opinion filed by Chief Judge Edwards.

Dissenting opinion filed by Circuit Judge Wald, in which Circuit Judges Rogers and Tatel join.

Supreme Court, U.S.
FILED
NOV 29 1995
CLERK

Nos. 95-509 and 95-520

In the Supreme Court of the United States

OCTOBER TERM, 1995

PACIFICA FOUNDATION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ACTION FOR CHILDREN'S TELEVISION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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25pp

QUESTION PRESENTED

Whether the Constitution forbids the government from prohibiting radio and television broadcasters from carrying indecent programming between the hours of 6 a.m. and 10 p.m.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988)	4, 17
Action for Children's Television v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992)	5
Alliance for Community Media v. *FCC*, cert. granted, No. 95-227 (Nov. 15, 1995)	8, 18
Bethel School Dist. No. 403 v. *Fraser*, 478 U.S. 675 (1986)	15
Buckley v. *Valeo*, 424 U.S. 1 (1976)	16
Burson v. *Freeman*, 504 U.S. 191 (1992)	16
California v. *Rooney*, 483 U.S. 307 (1987)	9
Columbia Broadcasting Sys., Inc. v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973)	9
Denver Area Educational Telecommunications Consortium v. *FCC*, cert. granted, No. 95-124 (Nov. 13, 1995)	8, 18
Dial Information Servs. Corp. v. *Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992)	17
Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464, In re:	
4 F.C.C.R. 8358 (1989)	15
5 F.C.C.R. 5297 (1990)	5
FCC v. *League of Women Voters*, 468 U.S. 364 (1984)	9

Cases—Continued: Page

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) 3, 9, 10, 15, 17
Ginsberg v. *New York*, 390 U.S. 629 (1968) 10, 15
Infinity Broadcasting Corp. of Pa., In re, 3 F.C.C.R. 930 (1987) 4
Information Providers' Coalition for Defense of the First Amendment v. *FCC*, 928 F.2d 866 (9th Cir. 1991) 17
Jones v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986), aff'd mem., 480 U.S. 926 (1987) 17, 18
New York v. *Ferber*, 458 U.S. 747 (1982) 10
Pacifica Foundation, 56 F.C.C.2d 94 (1975) 2, 3
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 9
Sable Communications of Cal., Inc. v. *FCC*, 492 U.S. 115 (1989) 9, 10-11, 15, 17
Turner Broadcasting Sys. v. *FCC*, 114 S. Ct. 2445 (1994) 18
WGBH, 69 F.C.C.2d 1250 (1978) 3

Constitution, statutes and regulation:

U.S. Const. Amend. I 4, 6, 9, 10
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2228 .. 4
Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949:
§ 10, 106 Stat. 951 18
§ 16, 106 Stat. 954 19
§ 16(a), 106 Stat. 954 (47 U.S.C. 303 note (Supp. V 1993)) 2, 5, 6, 7, 8, 9, 10, 13
Radio Act of 1927, Pub. L. No. 69-632, § 29, 44 Stat. 1172-1173 (codified as amended at 18 U.S.C. 1464) 2, 3
18 U.S.C. 2256 15
47 U.S.C. 223(b) 15
47 U.S.C. 401(c) 8

Statutes and regulation—Continued: Page

47 U.S.C. 504(a) 8
47 U.S.C. 223(b) 15
47 U.S.C. 503(b)(2)(A) 8
47 C.F.R. 73.3999 6

Miscellaneous:

138 Cong. Rec. (daily ed. June 2, 1992):
pp. S7310-S7320 5
pp. S7320-S7322 5
p. S7321 14

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-509

PACIFICA FOUNDATION, ET AL., PETITIONERS

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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ACTION FOR CHILDREN'S TELEVISION, ET AL., PETITIONERS

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in banc (Pet. App.[1] 1a-68a) is reported at 58 F.3d 654. The opinion of the panel (Pet. App. 69a-101a) is reported at 11 F.3d 170. The Federal Communication Commission's

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[1] References to "Pet. App." are to the Appendix to the Petition in No. 95-509.

Report and Order (Pet. App. 102a-133a) is reported at F.C.C.R. 704 (1993).

JURISDICTION

The judgment of the court of appeals in banc was entered on June 30, 1995. Petitions for a writ of certiorari were filed on September 26, 1995, and September 28, 1995, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a constitutional challenge to Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954 (1992), codified at 47 U.S.C. 303 note (Supp. V 1993), which requires the Federal Communications Commission (FCC) to promulgate regulations generally prohibiting the carriage of indecent programming on radio and television broadcast stations between the hours of 6 a.m. and midnight. The statute contains an exception for public radio and television stations that sign off the air at or before midnight, which are allowed to carry indecent programming after 10 p.m.

Since 1927, federal law has prohibited the broadcast of "obscene, indecent or profane language." Radio Act of 1927, Pub. L. No. 69-632, § 29, 44 Stat. 1172-1173, codified as amended at 18 U.S.C. 1464. In *Pacifica Foundation*, 56 F.C.C.2d 94 (1975), the FCC held that the broadcast by a New York radio station of a monologue by comedian George Carlin at 2 p.m. on a weekday was "indecent and prohibited by 18 U.S.C. 1464." 56 F.C.C.2d at 99. As the FCC noted, the language in the monologue "depict[ed] sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium," and the broadcast occurred "at a

time when children were undoubtedly in the audience (*i.e.*, in the early afternoon)." *Ibid.*

This Court upheld the FCC's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). The Court pointed to two factors that supported governmental regulation of indecent broadcasting. First, the Court noted, the broadcast media "have established a uniquely pervasive presence in the lives of all Americans." 438 U.S. at 748. Thus, an indecent broadcast "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.* Second, the Court emphasized, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. As the Court reaffirmed, the "government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justifie[s] the regulation of otherwise protected expression." *Ibid.* (citation omitted).

In the years following *Pacifica*, the FCC limited its enforcement of Section 1464 to material that fell within the particular fact pattern at issue in that case —*i.e.*, the repeated use of words virtually identical to those employed in the Carlin monologue. See, *e.g.*, *WGBH*, 69 F.C.C.2d 1250, 1254 (1978). Moreover, language in the FCC's decision in *Pacifica* gave rise to the assumption that such broadcasts would not be actionable if they began after 10 p.m. See 56 F.C.C.2d at 96, 99-100.

In 1987, however, the FCC altered its approach by applying the definition of indecency established in *Pacifica* to find that its rules were violated by the broadcast of programming not within the precise *Pacifica* fact pattern that included "explicit refer-

ences to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." Pet. App. 6a. *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930, 932 (1987). The FCC's decisions—as well as its statement that "12:00 midnight" was its current thinking on an appropriate enforcement limit—were reviewed by the court of appeals in *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*). After rejecting vagueness and overbreadth challenges to the FCC's indecency definition, 852 F.2d at 1338-1340, the *ACT I* court found that the FCC had not adequately supported the modification of its indecency safe harbor. In the court's view, principles of administrative law required the FCC to come forward with evidence that the new safe harbor would advance the government's interests in "promoting parental supervision of children's listening," while at the same time avoiding excessive intrusion "upon the licensee's range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech." 852 F.2d at 1344. Accordingly, the court remanded the case, emphasizing that under the First Amendment, any safe harbor rule must be "reasonable." 852 F.2d at 1343 n.18.

Following *ACT I*, Congress directed the FCC to promulgate regulations to enforce the existing statutory prohibition of indecent broadcasting "on a 24 hour per day basis." Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988). The FCC did so, and defended its regulations on the basis of an extensive inquiry into the nature and characteristics of the audience for television and radio broadcasting, an inquiry that

generated more than 92,500 formal and informal responses. See *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 5 F.C.C.R. 5297, 5310 n.6 (1990) (*1990 Report*) (C.A. App. 54). In *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992) (*ACT II*), the court of appeals struck down the statutory ban on the ground that because in *ACT I* it had stated that the FCC must "identify some reasonable period of time during which indecent material may be broadcast," it had necessarily decided that the FCC "may not ban such broadcasts entirely," even in compliance with a congressional directive.

In response to *ACT II*, Congress passed Section 16(a), which requires the FCC to

> promulgate regulations to prohibit the broadcasting of indecent programming —
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

47 U.S.C. 303 note (Supp. IV 1993). Section 16(a) thus generally enacts into law the broadcast indecency safe harbor contemplated by the FCC in its 1987 decisions and reviewed in *ACT I*. In doing so, Congress had before it the extensive record the FCC had generated in the proceeding that led to its *1990 Report*. See 138 Cong. Rec. S7310-S7320 (daily ed. June 2, 1992) (reprinting *1990 Report*); *id.* at S7320-S7322 (reprinting Reply Comments of Salem Communications Corp.). After notice and comment,

the Commission promulgated regulations establishing a broadcast indecency safe harbor in accordance with Section 16(a)'s mandate. Pet. App. 102a-103a, 135a-136a; 47 C.F.R. 73.3999.

Petitioners filed petitions in the court of appeals to review the FCC's implementing rules, contending that the rules and the statute violated the First Amendment. A panel of the appeals court held that the midnight to 6 a.m. safe harbor was unconstitutional. The panel acknowledged that the government has a "compelling interest in restricting the exposure of children to indecent material in the broadcast media," but concluded that the midnight to 6 a.m. safe harbor was not the least restrictive means of advancing that interest. Pet. App. 84a.

The full court vacated the panel's opinion and reheard the case *in banc*. The court first dismissed as "meritless" petitioners' contention that the statute as implemented was unconstitutionally vague, noting that the definition of indecency the FCC would apply in enforcing the safe harbor is identical to the definition that was before this Court in *Pacifica*. Pet. App. 10a. It then concluded (by a 7-4 vote) that Section 16(a)'s midnight to 6 a.m. safe harbor was narrowly tailored to serve compelling government interests, and thus, "standing alone," survived strict First Amendment scrutiny. Pet. App. 25a-26a.

The full court emphasized (as had the panel) that the government has a compelling interest "in supporting parental supervision of what children see and hear on the public airwaves," as well as an "interest in the well-being of minors [that] provides an independent justification for the regulation of broadcast indecency." Pet. App. 13a. The full court also found that the statutory safe harbor was "narrowly drawn"

to advance these interests. The court observed that the broadcast data collected by the FCC revealed that "large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight." Pet. App. 21a. Moreover, the court noted, "adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors." Pet. App. 23a. In the court's view, "deciding where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts is the kind of judgment that is better left to Congress, so long as there is evidence to support the legislative judgment." Pet. App. 25a.

Despite its conclusion that Section 16(a)'s midnight to 6 a.m. safe harbor was constitutionally unobjectionable when examined in isolation, the court found itself unable to uphold the provision's validity in full, because the safe harbor was enacted in conjunction with a preferential 10 p.m. to 6 a.m. safe harbor for certain public radio and television stations. "[T]he preferential safe harbor," the court stated, "has the effect of undermining both the argument for prohibiting the broadcasting of indecent speech before that hour and the constitutional viability of the more restrictive safe harbor that appears to have been Congress's principal objective in enacting section 16(a)." Pet. App. 27a. The court therefore held Section 16(a) unconstitutional "insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight." Pet. App. 28a.

ARGUMENT

The decision below is the first by any court to address the constitutionality of Section 16(a) and its implementing regulations. The decision does not conflict with that of any other court and correctly disposes of the issues presented by this case.[2] Further review is therefore not warranted. For reasons explained on pages 18-19, *infra*, however, the Court may wish to hold the present petitions pending its decision in *Denver Area Educational Telecommunications Consortium* v. *FCC*, No. 95-124, and *Alliance for Community Media* v. *FCC*, No. 95-227, cert. granted (Nov. 13, 1995).

1. At the outset, we note that although the court of appeals made clear that it believed Congress has the power to restrict indecent broadcast programming to the hours between midnight to 6 a.m., the court actually held Section 16(a) unconstitutional insofar as it prohibits indecent programming between 10 p.m. and midnight. Pet. App. 28a. Because the government has not petitioned for review of that holding, this case presents only the question whether a *10 p.m.* to 6 a.m.

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[2] Like the court below, other federal circuits have jurisdiction to consider the constitutionality of Section 16(a) and its implementing regulations. Any civil action brought by the Department of Justice to collect a forfeiture penalty for the unlawful broadcast of indecent programming would be filed in "the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs." 47 U.S.C. 504(a). That would permit review by the federal circuit with appellate jurisdiction over that district. See also 47 U.S.C. 401(c) (authorizing FCC to request that United States Attorney "institute in the proper court * * * all necessary proceedings for the enforcement of the provisions of this Act").

broadcast indecency safe harbor violates the First Amendment. This case is not the proper vehicle to review the constitutionality of the government's power to impose a midnight to 6 a.m. broadcast indecency safe harbor in some other statute. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted) ("This Court 'reviews judgments, not statements in opinions.'").[3]

2. In any event, a midnight to 6 a.m. safe harbor for indecent broadcasting (and *a fortiori*, the broader safe harbor imposed by the court of appeals) is constitutionally permissible.

a. As a general matter, "[t]he Government may * * * regulate the content of constitutionally protected speech" only "in order to promote a compelling interest" and then only "if it chooses the least restrictive means to further the articulated interest." *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). As this Court has recognized, however, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978); see *FCC* v. *League of Women Voters*, 468 U.S. 364, 377 (1984); *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388-389 (1969).

Governmental regulation of broadcast speech is particularly justified where indecent programming is

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[3] Petitioners Pacifica Foundation, et al., appear to challenge the constitutionality of Section 16(a) only insofar as it imposes a midnight to 6 a.m. safe harbor. See Pacifica Pet. i, 17, 20. Because Pacifica's petition does not take issue with the government's power to impose the broader safe harbor affirmed by the court of appeals, it should be denied.

concerned, for at least two reasons. First, the broadcast media "have established a uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748. Thus, an indecent broadcast "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.* Second, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749.

This case does not present the issue of the extent to which government regulation of indecent programming may be subject to a lessened First Amendment standard, however, because the court of appeals properly determined that Section 16(a)'s midnight to 6 a.m. safe harbor for indecent broadcast programming (and *a fortiori*, the 10 p.m. to 6 a.m. safe harbor that resulted from this decision) is "narrowly tailored to serve the Government's compelling interests in the well-being of our youth." Pet. App. 26a.

b. As petitioners implicitly concede (Pacifica Pet. 23; ACT Pet. 26), the government "has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves." Pet. App. 13a. See *Pacifica*, 438 U.S. 726, 749 (1978) ("the government's interest * * * in supporting 'parents' claim to authority in their own household' justifie[s] the regulation of otherwise protected expression"); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968).

The government also has a compelling interest in "safeguarding the physical and psychological well-being of * * * minor[s]," *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982), an interest that "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at

126. Petitioners disagree, contending that there has been no showing that broadcast indecency is harmful to children. Pacifica Pet. 21; ACT Pet. 15-16.

This Court has never required a scientific showing of what is as much a matter of common sense as a matter of psychological proof, however. *Ginsberg*, 390 U.S. 629, 642 (1968) (upholding prohibition on the sale to minors of sexually explicit material concededly not obscene for adults, even though there had been no demonstration of a "causal link" between such material and harmful effects). In this case, as the court of appeals held, "Congress [did] not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity." Pet. App. 16a-17a.

c. An indecency safe harbor protects the well-being of children and facilitates parental supervision of children's listening and viewing of broadcast programming by channeling such programming to the late hours of the evening, where the opportunity for parents to provide effective control is likely to be greatest, and the number of children in the broadcast audience the least. At the same time, such a safe harbor (whether commencing at midnight or at 10 p.m.) gives adults who wish to receive indecent programming the opportunity to do so at a time when their viewing does not pose an undue risk to children.

Petitioners contend that an indecency safe harbor limited to the late hours of the evening ignores the fact that parents have the opportunity to supervise their children's listening and viewing at other hours of the day. Pacifica Pet. 26; see ACT Pet. 23. But the opportunity to supervise does not necessarily trans-

late into effective control, or eliminate the government's interest in facilitating that control. The parents of a toddler have the "opportunity," for example, to supervise their child's activities and protect the child from harm during many hours of the day. But that opportunity plainly does not justify parents in leaving dangerous implements or poisonous substances within a child's reach on the expectation that they will be able to intervene before the child is hurt. By removing dangerous objects from easily accessible areas—by "child-proofing" their home—parents greatly increase the effectiveness of their supervision of a child's activities. In the same way, an indecency safe harbor channels potentially harmful programming to specific hours of the late evening, thereby allowing parents to concentrate their supervision of their children's television and radio viewing to a manageable portion of the broadcast day.

Common sense suggests that parents have other things to do, even during their hours at home, than constantly to monitor their children's radio and television listening and viewing for indecent programming. Moreover, the rise in the number of televisions and radios used by minors in the average home, see Pet. App. 14a, makes effective monitoring especially difficult. As the FCC has noted, "over 63% of homes have more than one television set, and between 25% and 50% of children have a set for their personal use." Pet. App. 114a. Radio is even more accessible, one study showing that nearly 9 out of every 10 children in 7th through 12th grades have a radio in their bedroom. Pet. App. 117a. In short, it is simply "fanciful," as the court of appeals concluded, "to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so

without meaningful restrictions on the airing of broadcast indecency." Pet. App. 18a.[4]

There is also no basis to conclude that a midnight to 6 a.m. safe harbor (or *a fortiori*, the 10 p.m. to 6 a.m. safe harbor actually upheld by the court of appeals) is unreasonable. The record created by the FCC, and relied upon by Congress in enacting Section 16(a), amply supports the court of appeals' conclusion that "large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight." Pet. App. 21a. For example, while 4.3 million children aged 12-17 are estimated to watch television across the country from 11-11:30 p.m. on week nights, "the number drops to 3.1 million * * * between 11:30 p.m. and 1:00 a.m. and to less than 1 million * * * between 1:45 and 2:00 a.m." Pet. App. 21a. See Pet. App. 116a-117a; accord 138 Cong. Rec. S7321 (daily ed. June 2, 1992). Statistics with regard to radio listeners similarly show that large numbers

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[4] Petitioners Pacifica Foundation, et al., contend that an indecency safe harbor impermissibly infringes upon the rights of those parents who wish to *expose* their children to indecent speech. Pacifica Pet. 27-28. Putting aside the weight to be given to such an interest, parents who wish to expose their children to indecent video or audio programming "will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes." Pet. App. 18a. By contrast, as the court of appeals recognized, parents who wish to protect their children from the same kinds of speech are unable to do so effectively absent government intervention.

of minors remain in the audience even after midnight. Pet. App. 22a; Pet. App. 117a-120a.[5]

Concomitantly, even a midnight to 6 a.m. safe harbor gives adults a "meaningful opportunity" to receive indecent television and radio programming. See Pacifica Pet. 16, 24. As the court of appeals observed, significant numbers of adults watch television and listen to radio after midnight. See Pet. App. 23a (noting that 15 percent of adults in Chicago, and 18 percent in Washington, D.C., watch broadcast television at midnight); *ibid.* (noting that 6 percent of adults listen to radio between 10:00 and 11:00 p.m., and 4 percent between midnight and 1:00 a.m.). Other adults who wish to obtain access to indecent broadcasts need simply stay up later in order to do so. Alternatively, adults remain free to use an audio or video tape recorder to preserve a broadcast for viewing or listening at a more convenient time. The safe harbor thus does not foreclose adults from receiving indecent programming—at most, it restricts the ability of

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[5] Petitioners complain that these statistics are misleading because they do not differentiate among stations or programs, and that such station or program-specific information might support a more narrowly tailored safe harbor. ACT Pet. at 16-18; Pacifica Pet. 29 n.16. As the court of appeals noted, it is unreasonable to presume that children will accurately record their viewing of indecent programming in audience surveys. Pet. App. 22a. More fundamentally, nothing prevents minors who are watching television or listening to radio from changing the channel or turning the dial; indeed, the practice of viewer "grazing" across the television or radio dial is undisputed. Thus, the fact that a particular station or program has not had a large number of children in its listening or viewing audience in the past provides no certain indication that its broadcast of indecent programming will not attract such an audience in the future. See Pet. App. 22a-23a.

some adults to see and hear such programming at the time of its original broadcast. In addition, although not in itself determinative, see ACT Pet. 24-25, it is plainly relevant that adults may obtain access to the same sorts of indecent speech in other ways, such as by "purchasing tapes and records" containing the same words and images. See *Pacifica*, 438 U.S. at 750 n.28; Pet. App. 24a. In all these circumstances, it is "entirely appropriate," as the court of appeals concluded, "that the marginal convenience of some adults be made to yield to the imperative needs of the young." Pet. App. 25a.[6]

Given the court of appeals' determination that there was a reasonable risk of a substantial number of children in the broadcast audience during the late evening hours, and its conclusion that a midnight to 6 a.m. safe harbor provided a meaningful opportunity for

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[6] Petitioners Pacifica Foundation, et al., also contend that the safe harbor fails to take into account "the First Amendment interests of maturing minors." Pacifica Pet. 25. That a seventeen year old is presumably more mature than a seven year old, however, does not preclude Congress from relying on data regarding teenage listeners and viewers in constructing an appropriate safe harbor for indecent broadcasting. The age of 18 has been found relevant in the federal dial-a-porn and child pornography statutes, see 47 U.S.C. 223(b); 18 U.S.C. 2256, as well as in similar laws of 48 States. See *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 4 F.C.C.R. 8358, 8368-8372 (1989). Moreover, this Court has recognized the government's compelling interest in restricting the availability of indecent material to "minors" generally, without drawing a distinction between teens and preteens. See, *e.g.*, *Sable*, 492 U.S. at 126; *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684-685 (1986); *Ginsberg*, 390 U.S. at 640-641. Finally, maturing teens, like adults, tend to have greater opportunities than younger children to stay up late and avail themselves of the statutory safe harbor.

adult access to such programming, it was entirely proper for the court to leave to Congress the judgment of "where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts." Pet. App. 25a. As the court recognized, "determining the parameters of a safe harbor involves a balancing of irreconcilable interests." Pet. App. 24a. The larger the safe harbor, the more the convenience of adult listeners and viewers to view indecent programming is served. By contrast, the smaller the safe harbor, the more the government's interests in protecting children and promoting parental supervision are advanced. The decision about how best to balance these competing interests, within constitutional limits, is a matter for legislative judgment, not for adjudication.

Thus, in *Buckley* v. *Valeo*, 424 U.S. 1, 30 (1976), this Court rejected a challenge to the contribution limits of the Federal Election Campaign Act, stating that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." Similarly, in *Burson* v. *Freeman*, 504 U.S. 191 (1992), the Court upheld Tennessee's ban on political solicitations within 100 feet of a polling place against arguments that the prohibited zone "could be somewhat tighter," concluding that the issue is not one of "constitutional dimension." 504 U.S. at 210 (plurality opinion); see also *id.* at 216 (Scalia, J., concurring in the judgment).

3. Finally, this Court's decisions in *Pacifica* and *Sable* effectively foreclose the claim by petitioners Action for Children's Television (ACT Pet. at 26-28) that the FCC's definition of broadcast indecency is unconstitutionally vague. The FCC's definition is

virtually identical to the definition this Court had before it in *Pacifica*. Compare Pet. App. 104a n.10 with 438 U.S. at 732. The definition was challenged as unconstitutionally vague in *Pacifica*, see 77-528 Brief for Amici Curiae American Broadcasting Cos., Inc., et al., at 33-39, but this Court upheld the FCC's power to regulate the broadcast of the Carlin monologue without expressing any vagueness concerns regarding the Commission's definition and, indeed, after quoting portions of that definition with apparent approval. See 438 U.S. at 739, 741. It thereby implicitly rejected any vagueness challenge. *ACT I*, 852 F.2d at 1339.

A similar vagueness claim against the FCC's indecency definition was also asserted in *Sable*. See 88-515 & 88-525 Br. for Appellant/Cross-Appellee Sable Communications of Calif., Inc., at 32-37. Although this Court overturned a congressional ban on indecent prerecorded telephone messages on other grounds, it did so without expressing any concerns that the FCC's generic definition of indecency would preclude more narrowly tailored efforts to regulate such messages. See 492 U.S. at 128. The *Sable* decision thus also strongly suggests that "the term 'indecent' as interpreted by the Commission is not per se void for vagueness." *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866, 874 (9th Cir. 1991). Accord *Dial Information Servs.* Corp. v. *Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992).

Petitioners assert that there is a conflict between these decisions and *Jones* v. *Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), aff'd mem., 480 U.S. 926 (1987), which affirmed a district court's decision that a Utah

statute regulating indecent programming on cable television was preempted by federal law and was in any event unconstitutionally vague.

Jones is plainly distinguishable. In the first place, the Utah statute at issue in the case had its own definition of indecency, which differed from that of the FCC. See 800 F.2d at 990 n.1. The statute also applied to cable, not broadcast television. As this Court has recognized, see *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2456-2458 (1994), there are important differences between the two media. Finally, *Jones* was decided before this Court's decision in *Sable*, and the appeals courts' decisions in *ACT I*, *Information Providers* and *Dial Information*. There is no reason to assume that the Tenth Circuit would address the vagueness issue in the same way without taking account of the analysis contained in those decisions.

4. On November 13, 1995, this Court granted certiorari in *Denver Area Educational Telecommunications Consortium* v. *FCC*, No. 95-124, and *Alliance for Community Media* v. *FCC*, No. 95-227. Those cases present a challenge to the constitutionality of Section 10 of the Public Telecommunications Act of 1992, 106 Stat. 951. That provision regulates indecent programming transmitted over leased access and public access cable television channels. It permits cable operators to ban such programming and requires operators who do not do so to "scramble" such programming and make it available only to subscribers who request it. The definition of "indecent programming" in Section 10 is essentially identical to the definition in Section 16. Compare 95-124 Pet. App. 172a (definition of "indecent programming" for purposes of Section 10) with 95-520

Pet. App. 3a ("indecent programming" for purposes of Section 16).

This Court's decision in *Denver Area* and *Alliance for Community Media* could affect the analysis and disposition of this case in two respects. First, one of the issues presented in those cases is whether the FCC's definition of "indecent programming" is unconstitutionally vague. See 95-124 Pet. i. Petitioner ACT in this case appears to raise a similar issue. See 95-520 Pet. 26-29. If the Court reaches that issue in the *Denver Area* and *Alliance for Community Media* cases, its analysis and disposition could affect the proper disposition of the similar issue in this case. Second, the interests advanced to support the constitutionality of the cable regulations in *Denver Area* and *Alliance for Community Media* are similar to the interests advanced to support the constitutionality of the broadcast television regulations in this case. For that reason as well, it is possible that the Court's resolution of the issues in *Denver Area* and *Alliance for Community Media* could affect the proper disposition of this case. Accordingly, the Court should hold these petitions pending its disposition of *Denver Area* and *Alliance for Community Media* and then dispose of these petitions accordingly.

CONCLUSION

The petitions for a writ of certiorari should be held pending this Court's decision in *Denver Area Educational Telecommunications Consortium* v. *FCC*, No. 95-124, and *Alliance for Community Media* v. *FCC*, No. 95-227, and then disposed of accordingly.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PACIFICA FOUNDATION; NATIONAL FEDERATION OF COMMUNITY BROADCASTERS; PUBLIC RADIO INTERNATIONAL; NATIONAL ASSOCIATION OF COLLEGE BROADCASTERS; INTERCOLLEGIATE BROADCAST SYSTEM; PEN AMERICAN CENTER; ALLEN GINSBERG,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

PAGE

AIDS Action Committee of Massachusetts, Inc. v. *Massachusetts Bay Transportation Authority*, 42 F.3d 1 (1st Cir. 1994) 3

Action For Children's Television v. *FCC*, 59 F.3d 1249 (D.C. Cir. 1995), *petition for cert. filed* Oct. 18, 1995 . . . . . 3, 9

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) 2, 6

Alliance for Community Media v. *FCC*, 56 F.3d 105 (D.C. Cir. 1995), *cert. granted*, No. 95-227 (Nov. 13, 1995) 8

Alliance for Community Media v. *FCC*, *cert. granted*, No. 95-227 (Nov. 13, 1995) 1, 8

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) 5, 8

Brown v. *Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) 5

Carey v. *Population Services International*, 431 U.S. 678 (1977) 8

Denver Area Educational Telegraph Consortium v. *FCC*, *cert. granted*, No. 95-124 (Nov. 13, 1995) 1, 8

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 8

FCC v. *League of Women Voters of Cal.*, 468 U.S. 364 (1984) 4

Ginsberg v. *New York*, 390 U.S. 629 (1968) 3, 4

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 6

Rubin v. *Coors Brewing Co.*, ___ U.S. ___, 115 S. Ct. 1585 (1995) 4

Sable Communications of Cal., Inc. v. *FCC*, 492 U.S. 115 (1989) 6

Schneider v. *State*, 308 U.S. 147 (1939) 7

Shad v. *Borough of Mt. Ephraim*, 452 U.S. 61 (1981) . . . 7

Triplett Grille, Inc. v. *City of Akron*, 40 F.3d 129 (6th Cir. 1994) 3

Turner Broadcasting System, Inc. v. *FCC*, ___ U.S. ___, 114 S. Ct. 2445 (1994) 4, 6

STATUTES

Public Telecommunications Act of 1992, Pub. L. No. 102-356, §§ 10, 16 106 Stat. 949 1

47 U.S.C. § 402 3

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents' response to the petition avoids the important constitutional questions this case raises. Respondents defend the decision of the court of appeals by studiously ignoring that Congress' broadcast ban extends to works of unquestioned political, social, literary, and artistic merit. They also invoke "common sense" and out-dated precedents that have little if any bearing on the issues presented for review. (Opp. 11, 12.)[1/] Respondents begrudgingly urge the Court to defer consideration of the instant petition until it has resolved a challenge to a related provision of the Telecommunications Act of 1992 governing indecent cable transmissions.[2/] *See Denver Area Educational Tel. Consortium* v. *FCC*, No. 95-124; *Alliance for Community Media* v. *FCC*, No. 95-227, *cert. granted* (Nov. 13, 1995). By recognizing the partial overlap among these cases, respondents unintentionally underscore the seriousness of petitioners' constitutional claims and identify additional reasons why the Court should issue a writ of certiorari in this case to undertake a concurrent review of Congress' indecency regulations as applied to both the broadcast and cable media.

1. Respondents would have the Court believe that the only speech prohibited by the 6 a.m. to midnight broadcast ban[3/]

[1/] References to "(Opp. __)" are to the pages of the Brief for the Respondents. References to "(Pet. __)" are to the pages of the Petition.

[2/] Section 16(a) of the Act regulates indecent programming broadcast over radio and television stations; section 10(a) regulates indecent programming transmitted over leased access and public access cable television channels. (Opp. 18.)

[3/] Respondents incorrectly suggest that petitioners Pacifica Foundation et al. challenge only the 6 a.m. to midnight broadcast ban and not the narrower 6 a.m. to 10 p.m. ban. (Opp. 9, n.3.) Although the thrust of

is little different than rank obscenity and thus has only marginal constitutional value. (Opp. 3-4.) As petitioners have shown, however, Congress' broad and vague definition of indecency -- heretofore unreviewed by the Court -- encompasses broadcasts of serious literary and artistic works as well as discussions of significant political and social issues such as AIDS, rape, war, and adult sexuality. (Pet. 12-14.) The FCC's enforcement actions themselves demonstrate beyond cavil the wide range of meritorious expression it may censor. (Pet. 13 & n.6.) Moreover, numerous broadcasters, including in particular non-commercial radio stations, have in the past and are likely again in the future to engage in self-censorship of meritorious programs to avoid adverse action by the FCC. (Pet. 14.) It is precisely because the combination of the FCC's regulatory scheme and its sweeping definition of indecency cuts such a wide swath across protected core speech that a meaningful safe harbor period must be permitted. *See Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (Ginsburg, J.).[4/]

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petitioners' argument focuses on the broader ban, their assertion that there are lesser restrictive means than channeling available to regulate broadcast indecency -- in particular separate regulation of public radio, channel or station-specific restrictions, and use of the so-called "V-chip" (Pet. 28-30, & nn.16,17) -- necessarily implies that the slightly broader safe harbor crafted by the court of appeals is as constitutionally defective as the 18-hour broadcast ban.

Moreover, the court of appeals expressly affirmed the constitutionality of the 6 a.m. to midnight ban precisely because Congress, the FCC, and the parties to this litigation have all focused their arguments (including those of the government here) on the 18-hour broadcast ban. Thus, the government's assertion (Opp. 8-9) that the constitutionality of the wider ban is not presented for review is without merit.

[4/] Respondents' assertion that certiorari should be denied because other courts of appeals may review the application of section 16(a) in the context of a forfeiture proceeding fails to acknowledge that the District of Columbia Circuit is given exclusive jurisdiction over a wide variety of

2. Respondents' arguments concerning the burden the government must meet to uphold a content-based regulation of protected speech are similarly flawed in that they are based on a misreading of out-dated case law and a failure to apply the principles the Court has articulated in recent decisions addressing the First Amendment.

a. Respondents rely on *Ginsberg* v. *New York*, 390 U.S. 629, 642 (1968) for the proposition that the government need not provide evidence of a "causal link" between indecent speech and harm to minors, but instead may regulate such

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FCC actions involving broadcasting. *See* 47 U.S.C. § 402. Moreover, indecency forfeiture proceedings are rarely, if ever, subject to judicial review and then only after years of delay. *See Action For Children's Television* v. *FCC*, 59 F.3d 1249, 1254 (D.C. Cir. 1995), *petition for cert. filed*, Oct. 16, 1995 (reported as *South Fork Broadcasting Corp.* v. *FCC* in advance copies of federal reporter). Given the numerous obstacles to judicial review, the circuit split contemplated by respondents is unlikely to develop, allowing the restriction and associated chill of First Amendment freedoms to continue unchecked by the Court's review. Under these circumstances, the sharp divisions within the District of Columbia Circuit, both as presently and formerly constituted, cry out for review by the Court.

In addition, although no other court has reviewed the constitutionality of this latest version of section 16(a), recent decisions by other courts of appeals addressing indecent speech generally are in tension with the District of Columbia Circuit's treatment of that category of expression. *See, e.g., AIDS Action Committee of Massachusetts, Inc.* v. *Massachusetts Bay Transportation Authority*, 42 F.3d 1, 9, 13 (1st Cir. 1994) (in striking down on First Amendment grounds transportation authority's refusal to run controversial AIDS prevention advertisements described as "sexually explicit" and "patently offensive," court concluded that the ads "are most certainly *not* obscene, and fall well within the heartland of speech that we, as a society, should be willing to tolerate in the marketplace of ideas"); *Triplett Grille, Inc.* v. *City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (striking down on First Amendment grounds city ordinance that "prohibits all public nudity, including live performances with serious literary, artistic or political value"). This tension provides further support for reviewing the court of appeals' decision in this case.

speech based on "common sense." (Opp. 11.) Fatally, respondents ignore that *Ginsberg* concerned *obscenity* and that as a result the Court only considered whether the statute's regulation of obscenity had a "rational relation" to the government's objective of safeguarding minors from harm. *Id.* at 643. Manifestly, the Court did not address the burden the Constitution imposes when speech fully protected by the First Amendment is at issue. *See* (53a-54a) (Edwards, C.J., dissenting.) On that question, numerous cases decided since *Ginsberg* have held that the government "must do more than simply posit the existence of the disease to be cured." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2470 (1994). Rather it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id. See also, e.g., Rubin* v. *Coors Brewing Co.*, ___ U.S. ___, ___, 115 S. Ct. 1585, 1592-93 (1995); *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 391 (1984). Respondents ignore these recent precedents which, on their face, compel the rejection of their appeal to "common sense" where First Amendment freedoms are at stake.

b. Moreover, even "common sense" compels rejection of the regulatory scheme at issue. As we have shown, materials potentially falling within the statute's broad definition of indecency not only are easily accessible to teenagers in our society, but often are made available to them in the nation's public schools. (Pet. 25.) "Common sense" dictates that such materials, which include, *inter alia*, major works of literature, sexual education materials, and discussion of topics relating to sexuality and public health, necessarily cannot be deemed harmful to minors when teachers and educators widely conclude that the materials are of considerable educational value.[5/]

[5/] As recent court decisions make clear, schools have also found educational value in discussing with students AIDS prevention measures that include "sexually explicit" materials and "profane, lewd and

c. Respondents' focus on "effective" parental supervision of children ignores the Court's teachings in *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983), that the relevant constitutional inquiry is whether parents have the *opportunity* to supervise their children's listening and viewing habits. It is telling that respondents cite no case law to support their analysis. (*See* Opp. at 11-13.)

The real thrust of the government's argument is apparent from its hypothetical involving a toddler at risk of injury from common household objects. According to respondents, the only way parents can be certain that their children are not exposed to "dangerous implements or poisonous substances" only by "child-proofing their home." By analogy, respondents argue that parents can control their children's listening and viewing habits only by means of a government-imposed broadcast ban encompassing the hours when most adults and children are awake. (Opp. 12.)[6/] It is remarkable that respondents have equated constitutionally protected speech with poison. It is equally remarkable that respondents have failed to notice that childproofing of homes is a task commonly performed by parents, without the compulsory oversight of government bureaucrats. But even putting aside that respondents'

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lascivious language to describe body parts and excretory functions." *See, e.g., Brown* v. *Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995).

[6/] The government attempts to justify its ban by complaining that parents "have other things to do" than to exercise parental control. (Opp. 12.) Determination of the proper degree of parental supervision, of course, is a decision for parents to make, not Big Brother. Similarly, whether parents choose to permit their children to have radio or television sets in their own room is a matter of parental choice, and, in any event, does not preclude exercise of parental authority over the use made of the sets. The vagaries of parental control do not require permitting the FCC to invade every child's, and by extension, every citizen's bedroom, living room, and den.

childproofing analogy fails on these grounds, the analogy also directly conflicts with the Court's analysis in *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115 (1989).

In *Sable*, the Court rejected as "quite unpersuasive" the government's assertion that a ban on indecent telephone communications was constitutional because it was the most effective means of protecting children from exposure to those communications. *Id.* at 128. Notwithstanding that any other means of regulation would not be "foolproof," the Court held that the ban violated the First Amendment precisely because its denial of adult access to indecent telephone messages "far exceeds that which is *necessary* to limit the access of minors to such messages." *Id.* at 131, & n.10 (emphasis added). Respondents' arguments based on "effective" parental supervision cannot be squared with the Court's reasoning in *Sable*.

3. Equally misguided is respondents' attempt to shield the 18-hour broadcast ban from constitutional review by arguing that it is merely a legislative judgment to which the Court must conclusively defer. (Opp. 16.) The Court's case law, ignored by respondents, undermines this precise assertion. *See, e.g., TBS*, 114 S. Ct. at 2471 (Court has "an obligation to exercise independent judgment when First Amendment rights are implicated"). Without such independent review, "the scope of freedom of speech . . . would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 844 (1978).

As petitioners have demonstrated, the question of least restrictive means is decidedly not "a matter for legislative judgment." (Opp. 16.) To the contrary, the broad sweep of the FCC's definition of indecency, together with a channeling rule that "stretch[es] to all but the hours most listeners [and viewers] are asleep," *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (Ginsburg, J.), makes the determination of a reasonable safe harbor "a constitutional

necessity." (61a) (Wald, J., dissenting.)

Petitioners have conclusively shown that the record does not support the government's presumption of harm from indecent speech. (Pet. 22-23, & nn.13, 14.) They have also highlighted numerous less restrictive alternatives to a sweeping channeling rule, including a narrower regulation specifically tailored to the listening habits of the radio audience, channel or station-specific restrictions on indecent broadcasts, and use of the so-called "V-chip," which permits parents to block programs they do not wish their children to view. (Pet. 29-30.) Consideration of each of these alternatives, admittedly absent here, is required under the "exacting scrutiny" mandated by *TBS* and *Sable* to ensure that the government does not impose unnecessary burdens on protected expression.

4. Respondents' treatment of the First Amendment rights of adults and maturing minors is nothing short of startling. Respondents utterly ignore that Congress' exclusive concern in establishing the broadcast ban was to minimize the number of children in the audience; it made no effort to balance the First Amendment rights of adult viewers and listeners to receive constitutionally protected speech. (Pet. 23-24.) Nor did Congress consider the First Amendment interests of older minors, other than to lump together all "children" under 18 for purposes of the broadcast ban.[7/] The absence of such constitutional balancing is inconsistent with a long line of precedents supporting the free speech rights of minors. *See,*

[7/] Respondents' contention that adults and minors have non-broadcast alternatives to receive indecent expression ignores the Court's repeated admonition that content-based restrictions on speech cannot be justified on the ground that "other channels of communication" remain open. *Bolger*, 463 U.S. at 69, n.18. *See also, e.g., Shad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981); *Schneider* v. *State*, 308 U.S. 147, 163 (1939). It also ignores the crucial fact that speech containing indecent material, including in particular live news reports and live talk shows, loses much of its value if communicated to its audience at a later time.

e.g., *Bolger*, 463 U.S. at 74, n.30; *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 692, n.14 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213-14 (1975). The government's response to this constitutional mandate -- urging "maturing teens . . . to stay up late and avail themselves of the statutory safe harbor" (Opp. 15, n.6) even when such behavior is contrary to their parents' wishes -- merely highlights the way in which the broadcast ban undermines rather than promotes parental supervision of children.

5. Finally, the Court's recent grant of certiorari in *Denver Area Educational Tel. Consortium* and *Alliance for Community Media* underscores the need for review of the court of appeals' decision upholding the 18-hour broadcast ban. Indeed, respondents themselves correctly state that "the interests advanced to support the constitutionality of the cable regulations in [those cases] are *similar* to the interests advanced to support the constitutionality of the broadcast television regulations in this case." (Opp. 19) (emphasis added.) If the Court wishes to resolve in an efficient manner the question of Congress' constitutional authority to regulate indecent broadcast and cable programming, it should grant certiorari in these cases and hear them, or at least decide them, together with the cable indecency decisions.

The cable cases currently before the Court concern restrictions on indecent speech enacted by Congress in the same statute that is at issue in the instant petitions. Both sets of cases were argued before the District of Columbia Circuit on the same day and were decided by the same 7-to-4 majority of the en banc court of appeals. More significantly, the reasoning employed by the court of appeals majority in the cable cases draws in part on its analysis of broadcast indecency and, what is more, highlights the error of the majority's decision upholding the 18-hour ban. *See Alliance for Community Media* v. *FCC*, 56 F.3d 105, 125 (D.C. Cir. 1995) (en banc), *cert. granted*, (Nov. 13, 1995) ("segregation and blocking appear to accommodate the interests of those viewers who want indecent

programming better than would a safe harbor system, under which cable viewers would be confined to watching such programming during designated, often inconvenient time periods"). *See also* (57a) (Edwards, C.J. dissenting) (stressing government's reliance on segregate-and-scramble technology in cable media but failure to consider applying such technology to broadcast media).

In reviewing "the application of the First Amendment in the context of 'indecent' speech in the broadcast media," including cable, Chief Judge Edwards recently lamented the hopelessly muddled state of the law and urged the Court to remedy this confusion:

> I have come to the conclusion that the law is in a state of disarray. Application of the First Amendment in this context seems to border on the whimsical, for as often as not there is little coherence in the case law. For example, I have yet to comprehend the distinction that is drawn between *broadcast* and *cable* television, with broadcast stations having reduced First Amendment rights even though cable is concededly much more responsible for the showing of indecent programming. . . .
>
> I conclude with an innocent hope that the Supreme Court will one day soon lend some clarity to these areas of First Amendment jurisprudence.

Action for Children's Television v. *FCC*, 59 F.3d 1249, 1263, 1264 (D.C. Cir. 1995) (Edwards, C.J., concurring with reservations), *petition for cert. filed*, Oct. 16, 1995.

Petitioners respectfully urge the Court to heed Judge Edwards' words and to issue a writ of certiorari in this case to resolve Congress' attempt to regulate indecent expression over the nation's airwaves and cable transmission lines.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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